APPENDIX

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 75-1069

RICHMOND UNIFIED SCHOOL DISTRICT,
RICHMOND BOARD OF EDUCATION,
and W. W. SNODGRASS,
Petitioners,

VS.

SONJA LYNN BERG, individually and on behalf of all other female employees of the Richmond Unified School District,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petition for Writ of Certiorari Filed January 28, 1976
Certiorari Granted January 25, 1977

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DOCKET ENTRIES

1973

Feb. 5—1. Filed Complaint, Iss summons.

Feb. 5—3. Filed Deft's argument opposing Granting of TRO.

Feb. 5—4. Filed Affidavit of Sam Teese.

Feb. 8—6. Filed Not of mo for prelim. inj., set for 2-22-73.

Feb. 8—7. Filed Mo for Prelim. inj.

Feb. 20—10. Filed Defts. Opposition to Mo. for Preliminary Injunction & Points & Authorities

Feb. 20—11. Filed Memo. of Points & Authorities in Support of TRO & of Motion for Preliminary Injunction

Feb. 22—13. Filed Ord granting Mo for prelim inj. AJZ
ORD: Pltff's mo for prelim inj—granted. AZ

Mar. 16—15. Filed Pltff's supplemental Memo regarding jurisdiction.

Mar. 22—16. Filed Not of mo & mos to dismiss; set for 4-16-73.

Apr. 3—17. Filed Statement in opposition to mo to dismiss.

Apr. 11—19a. Filed Deft's Reply Pts & Auths. in supp of mos to dismiss.

Apr. 16—ORD: Pltff's mo to certify Class action—denied.

Deft's mo to dismiss—denied.
Deft's mo to stay—denied. AJZ

Apr. 23—20. Filed Pltff's amended Complt.

Apr. 23—21. Filed Pltff's Not of Mo & mo to file supplmt to complt.

Apr. 23—22. Filed Pltff's Not of appl & appl for correction of orders.

Apr. 30—24. Filed Deft's Order denying Mo to approve class Action. AJZ

May 1—25. Filed Deft's Orders on Mos to Dismiss, All Mos of Richmond Unified School Dist. to Dismiss—denied.

May 9—27. Filed ANSWER AND DEMAND FOR TRIAL BY JURY by Deft. Richmond Unified School Dist.

May 9—28. Filed Defts. Richmond Oppo. to Mo. to File Suppl to Compl.

May 14—29. Filed Stipu. to correct Orders issued on 4/16/73.

May 14—30. Filed ORDER Granting Mo. to Dismiss without prejudice to pltf. AJZ
ORDERED Pltfs. Mo. to File Suppl. Compl. GRANTED AJZ

May 24—31. Filed No. of Mos. & Mos to Dismiss, 6/18/73, 1:30 PM

May 25— Lodged Order on Mo. to Supplement Complaint

June 7—32. Filed ORDER on Mo. to Supplement Compl. GRANTED AJZ

June 7—33. Filed Supplement to Complaint

June 8—34. Filed Pltfs. Statement in Oppo. to Mos. to Dismiss Civil Action

June 18— ORDERED Pltfs. Mo. to Dismiss DENIED . . . Court will file memo. opinion AJZ

July 20—35. Filed No. of Mo. & Mo. for Summ Judgt. 8/13/73, 1:30 PM . . . Statement in Support of Mo. for Summary Judgment . . . Memo. of Points & Auth. in Support of Summ Judgt.

July 30—37. Filed ORDER Denying Mo. to Dismiss

Aug. 13—39. Filed Defts. Statement on Issues of Material Facts; Cross Mo. for Summ Judgt; Afft. of F. Larson, S. Marchesi, Points; & auth in oppo. to Pltfs. Mo. for Summ Judgt.

Aug. 15—42. Filed Memo. of Points & Auth. in Oppo. to Defts. Mo. for Summ Judgt.

Aug. 20— ORDERED Pltfs. Mo. for Summ Judgt GRANTED in part . . . Defts. Mo. for Summ Judgmt denied . . . Court will file memo. opinion & Pltf. to submit form of judgt. AJZ

Aug. 31—43. Filed Order granting Mo for summary Judgt for Pltff. & Defts Mo for summ Judgt Denied, Pltffs Mo for Class action Granted in Part & denied in Part, Defts are permanently enjoined from denying accumulated sick leave for the period she was unable to work because of effect of pregnancy. Pltffs atty shall submit itemized request for attys fees, Pltffs atty to prepare order. AJZ

Oct. 5—47. Filed notice of appeal by the Defts, (Filed Untimely) Made and mailed notice to Counsel

Oct. 5—48. Filed Bond for costs on appeal ($250.00)

Dec. 5—50. Entered Judgment, Filed Dec 4, 1973 that Pltf's mo for sum judg't is granted and defts' mo for sum judg't is denied; Pltf Mo for Class action certification is granted in part and denied in part; & etc. AJZ

Dec. 13— Made and mailed notice of judgment to counsel of record.

1974

Jan. 2—52. Filed notice of appeal by the Defts. made and mailed notice to counsel of record & CCA.

Jan. 28—53. Filed Reporter's Transcript.

Jan. 10—54. Filed Designation of the record on appeal.

Jan. 10—55. Filed Order for preparation of reporter's transcript.

Jan. 30— Made and mailed record to 9th CCA.

In the United States District Court
Northern District of California

C-73-0192 AJZ

Sonja Lynn Berg, individually and on behalf of all other female employees of the Richmond Unified School District,
Plaintiff,

vs.

Richmond Unified School District, Richmond Board of Education, and W. W. Snodgrass,
Defendants.

COMPLAINT FOR INJUNCTIVE RELIEF AND DAMAGES

Plaintiff alleges:

I.

This action arises under 42 U.S.C. sections 1981 and 1983, under the Fourteenth Amendment to the United States Constitution, and under 42 U.S.C. 2000e et seq., known as the Civil Rights Act of 1964. Jurisdiction of this Court is invoked pursuant to sections 1331 and 1343(3) of Title 28 of the U.S. Code, and pursuant to section 2000(e)-5(f) of Title 42 of the U.S. Code, respectively.

II.

At all times mentioned herein, plaintiff Sonja Lynn Berg was and is a resident and citizen of the United States and of the City of Pinole, County of Contra Costa, State of California, and was and is a female person employed by defendant Richmond Unified School District ("District") as a teacher.

III.

Plaintiff brings this action on behalf of herself and, pursuant to Rule 23 of the Federal Rules of Civil Procedure, on behalf of all other female employees of the defendant District who have been or who will be discriminated against on account of sex by the District's policies regarding maternity leave and accrued sick pay benefits to pregnant employees. Said policies, the terms of which are set forth more fully hereinafter, require a female employee who is pregnant to take a compulsory leave at a time and for a period in the sole discretion of defendants, and said policies furthermore refuse sick pay or any other compensation to that female employee during the entire period of compulsory maternity leave. The class of female employees affected by said policies is so numerous that joinder of all members of that class is impracticable. Because the said policies of defendants deny to all members of the class the equal protection of the laws, and because the said policies violate the rights of all members of the class as defined under Title VII of the Civil Rights Act of 1964, there are questions of law and fact in common among all members of the class. The claims of plaintiff, Sonja Lynn

Berg, typify the claims of all members of the class, and plaintiff, Sonja Lynn Berg, will fully and fairly represent the interest of said class.

IV.

At all times mentioned herein, defendant Richmond Unified School District was and is the duly constituted governmental entity responsible for the operation of the primary and secondary public school system of the City of Richmond, County of Contra Costa.

V.

At all times mentioned herein, defendant Richmond Board of Education ("Board") was and is the duly organized and appointed body vested with overall responsibility for the primary and secondary public school system of defendant District. Defendant W. W. Snodgrass is the Superintendent of the defendant District and is its chief executive officer, who is charged with enforcement of District policy, and defendant W. W. Snodgrass is sued herein in his official capacity.

VI.

At all times mentioned herein, each defendant was and is acting as the agent of each other defendant, and each did the acts complained of herein in the course and scope of his employment.

VII.

Plaintiff is informed and believes and on that basis alleges that, at all times mentioned herein, defendants,

and each of them, acting under color of state law, promulgated, caused to be promulgated or enforced the leave regulations of the Richmond Unified School District, section 131.10 of which governs "maternity and paternity leaves", a copy of which is attached hereto as Exhibit "A" and is incorporated herein by reference. Section 131.10 compels leave of a pregnant employee to commence upon or before the first day of the seventh month of pregnancy, and further requires a minimum of thirty (30) days notice by the pregnant employee of intent to return to work. Section 131.10 further allows an optional day of paternity leave with full pay to the father who chooses to take such leave.

VIII.

Plaintiff is informed and believes and on that basis alleges that, at all times mentioned herein, defendants, and each of them, acting under color of state law, promulgated, caused to be promulgated or enforced an unwritten policy of defendant District, which disallows the use of accumulated sick pay by an employee for or during her maternity leave.

IX.

Plaintiff is informed and believes, and on that basis alleges, that on November 29, 1972, defendant Board met, and defendant W. W. Snodgrass proposed at that meeting that defendant Board adopt an interim maternity leave policy that would allow consideration of case-by-case exceptions of individual pregnant employees to the seventh month mandatory leave policy

of defendant District embodied in Regulation section 131.10 of defendant's leave regulations. This proposal was recorded in the minutes of the meeting of defendant Board, a copy of which is attached hereto as Exhibit "B" and is incorporated herein by reference. According to the said minutes of that meeting of November 29, 1972, the matter of interim maternity policy was then tabled. On December 13, 1972, defendant Board voted to approve the interim maternity leave policy proposed on November 29, 1972, in minutes recorded and attached hereto as Exhibit "C", incorporated herein by reference.

X.

At all times mentioned herein, plaintiff was and is a female employee of defendant District. On or about December 14, 1972, plaintiff filed a request for maternity leave, indicating that her date of confinement was expected to be March 24, 1973. On or about December 20, 1972, plaintiff notified defendants, and each of them, in writing, that she did not wish to be compelled to take maternity leave prior to March 23, 1973, and that her doctor agreed to that extension from the arbitrary leave period in her case. A copy of said written notification by plaintiff is attached hereto as Exhibit "D" and is incorporated herein by reference. On or about December 6, 1972, plaintiff's physician, Dr. Robert Tomfohrde, wrote a letter, sent to Mr. Sam Teese, Assistant Superintendent of Personnel of defendant District, which letter indicated that plaintiff could work until the date of her confinement, on or about March 24, 1973. A copy of said

letter from Dr. Tomfohrde is attached hereto as Exhibit "E" and is incorporated herein by reference.

XI.

In or about the first week of January, 1973, plaintiff's attorney sent copies of an affidavit of Dr. Robert Tomfohrde, plaintiff's physician, to defendants, which affidavit stated under notarization that there was no contraindication for plaintiff, Sonja Lynn Berg, to continue work as a teacher until March 24, 1973. A copy of that affidavit is attached hereto as Exhibit "F" and is incorporated herein by reference.

XII.

On or about December 27, 1972, plaintiff received a letter from Mr. Sam Teese, Assistant Superintendent of Personnel of defendant District, a copy of which is attached hereto as Exhibit "G" and is incorporated herein by reference. In that letter, defendants, and each of them, refused to take account of the medical advice of plaintiff's doctor as to the proper time for her maternity leave, and required that plaintiff submit to examination by a District-appointed physician in order to have her pre-leave period extended to the date recommended by herself and her doctor. On or about January 10, 1973, plaintiff's attorney informed defendants, and each of them, in writing, of plaintiff's refusal to comply with their requirements for maternity leave set out in their letter to plaintiff of December 27, 1972, which is Exhibit "G" herein, to wit., requiring that plaintiff gain approval of a District-appointed physician for

the possible extension of plaintiff's pre-leave teaching period to March 24, 1973. A copy of said letter from plaintiff's attorney to defendants is attached hereto as Exhibit "H" and is incorporated herein by reference.

XIII.

The interim leave policy of defendants, adopted on December 13, 1972 and described in Exhibit "B" of this Complaint, discriminates against plaintiff because of her sex, in violation of the Fourteenth Amendment to the United States Constitution and in violation of sections 1981 and 1983 of Title 42 of the United States Code, in that said interim leave policy arbitrarily and capriciously singles out pregnancy, a condition unique to females, and treats pregnant female employees differently than employees with other illnesses or physiological conditions are treated. By the express reference of the said interim maternity leave policy to the seventh month leave line drawn in defendants' original leave Regulation 131.10, the arbitrary operation of the seventh month leave date is sustained in the interim policy.

XIV.

The requirement of defendants, and of each of them, as delineated in Exhibit "G" of this Complaint, that plaintiff gain and show approval of a District-appointed physician for a pre-leave extension beyond the arbitrary leave date referred to in defendants' interim policy, arbitrarily and capriciously operates against plaintiff, in that it treats

plaintiff differently from employees requesting leaves pursuant to medical conditions other than pregnancy.

XV.

The unwritten policy of defendants, and of each of them, which denies the utilization of accrued sick pay benefits to plaintiff and to all other pregnant female employees similarly situated, constitutes a violation of the Fourteenth Amendment rights of plaintiff and of the class she represents by denial of equal protection of the laws to this class of females, and said policy of denial of sick pay accruals to pregnant females upon leave violates Title VII of the Civil Rights Act of 1964, which has been amended to implement the prohibitions against sex discrimination as against governmental entities such as defendants herein.

XVI.

Unless restrained by this Court, defendants, and each of them, will implement these policies, and will terminate plaintiff, without pay and without allowing her to use her accumulated sick pay benefits, on February 24, 1973, thereby causing irreparable harm to plaintiff. There is no adequate remedy by law herein because plaintiff will be terminated before her claim can be adjudicated. There is substantial reason to believe that plaintiff will prevail on the merits of this action. The granting of a preliminary injunction restraining defendants, and each of them, from terminating plaintiff on February 24, 1973, or from otherwise applying the maternity leave and sick pay

exclusion to plaintiff or to any other member of the class represented by plaintiff in this action, will preserve the status quo until the constitutionality and legality of defendants' policies and practices at issue herein can be adjudicated. Therefore, plaintiff requests that a preliminary injunction be granted, restraining defendants, and each of them, from implementing defendants' maternity leave policy and terminating plaintiff or any other member of the class she represents, and restraining defendants, and each of them, from denying to plaintiff or to any other member of the class she represents the full benefit of accumulated sick leave pay during the period of delivery, confinement and recuperation of plaintiff or other member of the affected class. Said injunction should be made permanent after a trial of this action upon its merits. Because of the considerable likelihood of irreparable harm to plaintiff and to other members of the class she represents, if defendants or any of them should implement the maternity leave and sick pay exclusion policies of defendants, plaintiff requests that a temporary restraining order be granted by this Court, restraining defendants, and each of them, from any such implementation of these policies until plaintiff's motion for a preliminary injunction is heard and decided.

XVII.

Because of said discriminatory policies and practices of defendants, and of each of them, plaintiff and other members of the class she represents have suffered or will suffer damages, including but not

limited to loss of wages and sick leave benefits, in an amount presently unascertainable. Plaintiff prays leave of this Court to amend this Complaint to plead the exact amount of damages suffered once this amount has been ascertained according to proof at trial upon this action.

Wherefore, plaintiff prays:

1. For a temporary restraining order pending hearing on plaintiff's motion for a preliminary injunction;

2. For a preliminary injunction;

3. For a permanent injunction;

4. For damages according to proof;

5. For costs of suit incurred herein, including attorney's fees;

6. For such other relief as this Court may deem meet and proper.

Dated, January 25, 1973

Respectfully submitted,
Equal Rights Advocates:
Davis, Dunlap & Williams
San Francisco, California
By: Mary Cynthia Dunlap
Attorney for Plaintiff

VERIFICATION

State of California
City of Berkeley, County of Alameda } ss.

Sonja Lynn Berg, being duly sworn, deposes and says:

That she is plaintiff herein.

That she has read the foregoing Complaint and knows the contents thereof and that the same are true of her own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters, she believes them to be true.

Sonja Lynn Berg

Exhibit "A"

Section 131.10 Maternity and Paternity Leaves

1. In all cases of expected maternity of a permanent certificated employee, the employee must secure an extended leave of absence. This leave must become effective no later than the start of the seventh month of pregnancy.
2. Maternity leave may be terminated by the individual teacher by presenting a statement from a physician that the individual is physically and mentally able to resume teaching. The certificated employee shall give a minimum of 30 days notice of intent to return.
3. In case of adoption of an infant, the mother will be allowed maternity leave if she requests such leave.
4. Paternity leave of one (1) day may be granted the male employee without loss of pay during or immediately after the confinement of his wife. In cases of adoption of an infant, the same regulations will apply as in the case of a natural birth.

* * *

Exhibit "B"

MINUTES
RICHMOND UNIFIED SCHOOL DISTRICT
Regular Board Meeting
November 29, 1972—7:30 p.m.
Gymnasium—Helms Junior High School

4. *Maternity Leave, Interim Revision.*
Dr. Snodgrass stated that maternity leave currently is being discussed with the district's Certificated Employee Council. The position of the district has been to delay action on this item until the County Counsel has responded to a request for appropriate updating of current district policy. The County Counsel has asked for additional time to research the entire subject.

The superintendent said that current district policy mandates that maternity leaves become effective no later than the start of the seventh month of pregnancy. He said that several court cases across the United States have concluded that determination of the starting date for maternity leave is a matter to be determined between the employee and her physician. Some California school districts have adopted such a policy.

Pending completion of discussion with the Certificated Council, Dr. Snodgrass requested that interim board action to consider individually employee rquests to work beyond the start of the seventh month of pregnancy. In addition, the super-

intendent said this is an issue across the nation and that there are constitutional issues involved. He said the district's materials on this subject have been sent to the County Counsel, and that eventually the County Counsel will put together a leave policy for consideration. In the final policy, the district would recommend that the time for leave be determined from discussions with the individual, the medical doctor and district personnel. Today's request, said the superintendent, is an interim request and he feels it is the most equitable approach to the problem.

Mr. Gay said the district carries workman's compensation, and he believes the district should attempt to determine how the workman's compensation insurance people feel about pregnant teachers working past the seventh month of pregnancy. He wondered what statistics might show on injuries because of such work, and asked that the matter of the interim change be held over to the board's next meeting.

Sam Teese, Assistant Superintendent, Personnel, said he believes Mr. Gay's point is well taken. The basic reason behind the beginning of maternity leave at the start of the seventh month, he said, was to protect school districts from lawsuits that might evolve from injuries to teachers. He said he does not believe there would be any valid statistics on injuries because almost all districts in the nation have had the same policy. Again, he emphasized that this was an interim request, and it

would be up to the district to see that no accidents took place.

It was moved by Mr. Bartels, seconded by Mr. Jageman, that the board permit the district to consider individually employee requests to work beyond the seventh month of pregnancy.

Mr. Jageman asked how long the interim period might be, and Dr. Snodgrass replied hopefully from six weeks to two months. Mr. Teese said the extension of leave would be up to the medical doctor in charge of the teacher, and would be somewhere between 30 to 45 days. Mr. Jageman asked who would make that determination, and Mr. Teese replied that the district would check with the doctor, but the final decision would be the district's. The first priority, he said, would be the welfare of the children. He said he would prefer to have leaves begin at the end of [illegible]educational unit, at the end of a quarter, or at the end of a semester break, and there has been little disagreement with employees in the past in taking their leaves at such times.

Mr. Gay asked how many teachers object to the present maternity leave requirement, and Mr. Teese said that during 1971-72 thirty-six maternity leaves were granted. Of that number a significant number did not return to work. He said annually the district is faced with some 30 to 35 maternity leaves. Dr. Snodgrass added that only in recent months had teachers objected to the present requirements because of the publicity given

to court cases. Mr. Teese said a significant number have not objected to the policy on merit, but some have on financial grounds, and some on the continuity of the educational program. In answer to a question from Mr. Gay, Mr. Teese said that maternity leaves on the interim policy would come through consultation also with the principal and teacher and the decision would be made that would benefit the educational program. Mr. Teese noted in discussion with Mr. Gay that the percentage of requests for maternity leaves are much higher on the elementary level than on the secondary level. Mr. Shattuck asked if the reason for the request for the interim change in policy is because of litigation in which the local district may become involved. Dr. Snodgrass replied that was correct, and the basis for the suits filed to date is that no individual consideration is given. Mr. Fuller said he had not intended to vote on this item but he does not wish it to be defeated at this time so he would call for tabling the matter of the interim change in maternity leave policy.

The vote on the motion to table was as follows: YES—Mr. Fuller, Mr. Gay, Mr. Shattuck. No—Mr. Bartels, Mr. Jageman. Absent—None. The item was ordered tabled.

Exhibit "C"

MINUTES
RICHMOND UNIFIED SCHOOL DISTRICT
Regular Board Meeting
December 13, 1972—7:30 p.m.
Gymnasium—Helms Junior High School

3. ***Maternity Leave Proposal, Action to Remove from Table.***

Dr. Snodgrass said that at the last board meeting a change in the maternity leave policy was prepared that would not mandate a leave at the end of six months of pregnancy. He said this would have been an interim change that would be in effect only until the final policy has been checked by the County Counsel's Office. Under the interim policy, he said, the district and the individual teacher would determine when the maternity leave would start. He said the item was tabled at the last meeting, but that a member of the board has asked that it be placed on the agenda for this meeting so that it can be removed from the table.

It was moved by Mr. Gay, seconded by Mr. Bartels, that the matter of an interim maternity leave policy be removed from the table.

Mr. Shattuck said a motion to remove from the table is not debatable and called for a vote.

Mr. Gay's motion, seconded by Mr. Bartels, to remove the matter of the interim maternity

leave from the table was approved. VOTE: Yes —Mr. Bartels, Mr. Gay, Mr. Jageman, Mr. Shattuck. No—Mr. Fuller. Absent—None.

Mr. Shattuck said he would now hear discussion on the item itself.

Mr. Bartels moved to adopt the interim maternity leave policy, as presented by Dr. Snodgrass, at the board's previous meeting. Mr. Jageman asked for clarification of the motion.

Mr. Bartels said that for clarification he would refer to the interim maternity leave proposal, as recommended by Dr. Snodgrass, at the November 29 board meeting. Mr. Jageman seconded the motion.

Mr. Gay asked how long the interim policy would be in effect, and the superintendent said he would expect it to remain in effect for six weeks to two months.

Mr. Fuller said he would like to amend the motion as it only pertains to certificated employees which is discriminatory.

Mr. Fuller then moved to amend the motion so that it would include classified employees. His amendment was seconded by Mr. Gay.

Mr. Jageman asked if there was any reason why the proposal applied only to certificated employees, and Dr. Snodgrass replied there was none, as maternity leave is the same for both classes of employees. Mr. Fuller responded that the proposal never mentioned any other than certificated em-

ployees and he wants to be sure that it will include classified employees. Mr. Shattuck expressed agreement with Mr. Fuller.

Henry Clarke, representing Public Employees Union Local No. 1, thanked Mr. Fuller for the amendment although, he added, the administration did explain to classified groups that there would be one policy. Mr. Shattuck agreed that he believes there will be one policy but it is just as well to have the policy clarified.

Mr. Fuller's amendment, seconded by Mr. Gay, to include classified employees in the interim change on maternity leave proposal was approved. VOTE: Yes—Mr. Bartels, Mr. Fuller, Mr. Gay, Mr. Jageman, Mr. Shattuck. No—None. Absent—None.

Mr. Fuller said that although he is against discrimination in employment, he still believes the proposal is ill-advised. He said he thinks leave at the end of six months of pregnancy is proper and he would wish to deviate from such a policy only if there are obvious educational benefits to pupils. For example, he said, if there is one month until the end of the semester the teacher should remain with the class if she is able to. He said he does not believe it is in the best interest of the school district to permit teachers to teach until the time the baby is due.

Mr. Shattuck said he does not believe the district necessarily wishes to permit teachers who are pregnant to teach any longer than they do now. He said he finds

that the policies do not differ between married and unmarried teachers who might be pregnant, and he believes this could present a difficult situation for the school district.

Mr. Gay said he would support the interim policy, and believes that the board and the district should give credence to a doctor's advice. He said it must be presumed that teachers who are pregnant are receiving good medical advice, and for that reason he would favor the interim motion.

Mary Moore, a district resident, said that she is employed at Hunt's Products in Oakland where women work a 10-hour day, 6 days a week, and if they are pregnant they are allowed to work as long as they are able to.

Mr. Shattuck thanked Mrs. Moore for her comments and said, however, everyone should realize the board must be concerned with educational results.

Mr. Bartels' motion, seconded by Mr. Jageman, to approve the interim maternity leave policy, as recommended by Dr. Snodgrass at the November 29 meeting, was approved. VOTE: Yes—Mr. Bartels, Mr. Gay, Mr. Jageman, Mr. Shattuck. No—Mr. Fuller. Absent—None.

Exhibit "D"

December 20, 1972

Mr. Sam Teese
Assistant Superintendent, Personnel Services
Richmond Unified School District
1108 Bissell Avenue
Richmond, California

Dear Mr. Teese:

I am sending this letter to request an extension of my maternity leave from February 23 to March 23. As a result of the December 13 School Board Meeting, which adopted an interim maternity leave policy, I have been informed by my principal that my maternity leave must commence February 23. This is thirty days before the expected date of confinement. My doctor feels there is no (physical or mental) reason why I cannot work until this time. The early enforced leave along with the exclusion of my accrued sick leave benefits during leave poses a financial burden on my family.

I am therefore asking that I be allowed to work until my doctor and I feel it is necessary for me to initiate my leave of absence. Thank you for your help and consideration in this matter.

Sincerely yours,
Sonja Berg

Exhibit "E"

Robert F. Tomfohrde, M.D.
2510 Webster Street
Berkeley, California 94705
849-1287

December 6, 1972

To Whom It May Concern:

R E: Berg, Sonja Lynn

Mrs. Berg's estimated date of confinement is March 24, 1973.

Mrs. Berg may work until the date of her confinement—March 24, 1973, and not stop at the seventh month date which will be January 13, 1973.

If there is any additional information you need, please contact this office.

R. F. Tomfohrde, M.D.

Exhibit "F"

[U.S. District Court title omitted in Printing]

AFFIDAVIT OF DR. ROBERT TOMFOHRDE

Dr. Robert Tomfohrde, being duly sworn, deposes and says:

I am a medical doctor. I am familiar with Sonja Lynn Berg, as she has been under my care during her pregnancy.

As of this date there is no medical contraindication for this patient, Sonja Lynn Berg, to work as a teacher until the date of her confinement, March 24, 1973.

Dated: Dec 21, 1972

Dr. Robert Tomfohrde,
M. D.

(Jurat om tted)

Exhibit "G"

Richmond Unified School District
December 27, 1972

Mrs. Sonja Berg
2559 Francis Drive
Pinole, California 94564

Dear Mrs. Berg:

Out of concern for District liability and effectiveness of the educational program, we would prefer to involve a District appointed physician in any decision related to extension of your maternity leave to one day prior to date of confinement.

Should a District physician recommend the extension of leave, the District would still reserve the right to commence the leave earlier should liability or educational program become a consideration.

We shall be pleased to process, on receipt, your request to see a District physician.

Sincerely,
Sam Teese
Assistant Superintendent
of Personnel

Exhibit "H"

Mary C. Dunlap,
Attorney at law
2020 Cedar Street #6
Berkeley, California
94709
Telephone:
(415) 8416553

To: Mr. Sam Teese
Assistant Superintendent of Personnel
Richmond Unified School District
1108 Bissell Avenue
Richmond, California 94802

Dear Sir,

I am writing to you on behalf of my client, Mrs. Sonja Berg. I am serving as counsel to Mrs. Berg in her dispute with the Richmond School District and its agents respecting the District's maternity leave and accrued sick pay policies. Mrs. Berg has asked my opinion about the advisability of submitting herself to the medical examination offered to her by a letter from you dated December 27, 1972 (hereinafter, the "letter"). It is my opinion, rendered in accordance with all applicable law on the subject, that the terms and conditions of the medical examination offered to Mrs. Berg by the letter are unlawful, because they constitute an enhancement of the invalid discrimination against females accomplished by the Richmond District's 30-day leave policy for pregnancy.

The reasons for my opinion are as follows:

1.) Mrs. Berg's own attending physician, Dr. Robert Tomfohrde, has indicated to the District in

writing that Mrs. Berg will be medically able to continue teaching until March 24, 1973, the date of her expected confinement for delivery. Dr. Tomfohrde has furthermore sworn an affidavit to that effect, a copy of which is enclosed hereinafter.

2.) There is absolutely no evidence that Dr. Tomfohrde's medical judgment is somehow untrustworthy or impaired. Also, Dr. Tomfohrde is the doctor under whose care Mrs. Berg has been and will continue to be during the pendency of her pregnancy, and is therefore highly familiar with her medical condition. Without any question of Dr. Tomfohrde's competence to determine whether Mrs. Berg may continue to work until March 24, 1973, the requirement that Mrs. Berg gain the assent of a District appointed physician to the extension of the pre-leave period beyond the arbitrary 30-day line amounts to an unnecessary and unreasonable restraint upon her right to continue work until or unless it is shown that her pregnancy is interfering with the effectiveness of the educational program or is exposing the District to untoward risks of liability to her, caused by her pregnancy.

3.) There can be little legal question that the District's mandatory leave policy violates applicable current principles on point. *See* Williams v. San Francisco Unified School District et al., 340 F. Supp. 438 (N.D. Cal. 1972).

The illegality of the District's maternity leave policy is not ameliorated by the proposed possibility of an exception for Mrs. Berg, qualified by the terms of the letter to her on the subject. Rather, by the requirement that Mrs. Berg permit herself to be examined by a "District appointed" physician, despite the fact that the medical judgment of her own physician establishes that she should not be subjected to the arbitrary 30-day leave requirement, the original discrimination of the 30-day line has been multiplied in her case. In the case of *Williams* cited above and in other recent federal decisions, the offensive part of mandatory maternity leave policies has been found to lie in the tendency of such policies to create invidious categories based upon sex; the requirement of a medical examination for pregnant females, or at least for Mrs. Berg, prerequisite to her receiving an extension of the arbitrary leave line, creates precisely such an invidious category.

4.) Counsel for Mrs. Berg recognizes and understands the significance of the District's interest in avoiding untoward liability in tort to pregnant employees, and in the continuity and functioning of the educational program. However, it has already been determined as a matter of law that these interests cannot support any maternity leave policy that fails to treat maternity on a case-by-case basis and that fails

to avoid sex discrimination in the manner of that treatment. In the situation at hand, the District's requirement that Mrs. Berg gain approval of a District appointed physician runs roughshod over the evidence now available to the District as to her individual case, to wit, that her own doctor has found her fit to continue teaching until March 24, 1973.

5.) The letter to Mrs. Berg claims a right on the part of the District to put her on leave despite its chosen physician's determination that she is fit to continue, if "liability or educational program become a consideration". Under the law, the District has no such generalized right, and Mrs. Berg is not about to create such a right by agreeing to the terms of the District's proposal stated in the letter.

Neither Mrs. Berg nor counsel for her wish to be unhelpful about resolving this dispute. However, the resolution proposed by the letter of December 27, 1972, amounts to a heightening of the legal objections of Mrs. Berg to the treatment of her pregnancy by the District. Even were the District to agree to free Mrs. Berg from its arbitrary 30-day policy, without its physician's examination as proposed, Mrs. Berg would remain dissatisfied and legally wronged. Mrs. Berg is unwilling to accept any settlement of this matter that fails to replace current pregnancy policies of the District with policies that are legal and that do not discriminate invidiously on account of sex. If the District through the Board or otherwise is unwilling to alter its maternity leave and accrued

sick pay policies to comport with applicable federal anti-discrimination law and with the U.S. Constitution, Mrs. Berg is prepared to litigate these issues as plaintiff in a class action, entitled on the caption of the enclosed affidavit, against the District, Board and Superintendent.

I am willing to meet with legal representatives of the District to determine whether a settlement in the above terms can be accomplished. However, because of the urgency of Mrs. Berg's legal situation with respect to the gaining of proper orders restraining enforcement of the mandatory leave policy, if necessary, any such meeting will have to be arranged and held promptly. I would suggest that if such a meeting is to transpire, it should transpire by the middle of January; otherwise, unless Mrs. Berg receives proper assurance that the Ditrict will change its leave and accrued sick pay policies to end the improper discrimination against females now entailed by them within the next few weeks, the legal action in this matter must be commenced.

For purposes of such a meeting, I can be reached by telephone at either (707) 2265564 in Napa, at the office of Coombs, Dunlap, Dunlap & Champlin, during the day, or at (415) 8416553, my residence, in the evening. I sincerely hope that this controversy can be settled in a manner that ends the unconscionable loss and injury to female teachers and other school employees that pregnancy under current policies of the District causes.

Yours truly,
Mary C. Dunlap
Attorney at law

[U.S. District Court title omitted in Printing]

ARGUMENT OPPOSING GRANTING OF TEMPORARY RESTRAINING ORDER

I

Since No Action Is Due Until February 23, 1973, There Is Time For a Hearing, and a Temporary Restraining Order Is Not Necessary or Justified.

Mrs. Berg, plaintiff herein, has represented to her employer, the defendant school district, that she is pregnant and that her expected date of delivery is March 24, 1973. The District's policy is not applicable to plaintiff Mrs. Berg until 30 days prior thereto, i.e., February 23, 1973. The three weeks until then provide sufficient time for this matter to be heard in connection with a motion for preliminary injunction, and militate strongly against the granting of a temporary restraining order, for the plaintiff cannot show that failure to obtain said order will result in "immediate and irreparable injury, loss, or damage . . ." (FRCivP 65(b)) within the next three weeks, and her interest in a temporary restraining order must be balanced against the right of the defendants to a hearing before any order is made against them.

The granting of such an order would appear to be futile in any case, since Rule 65(b) provides that it must expire within 10 days, unless extended for good cause. If granted on February 5, 1973, the order would thus expire no later than February 15, 1973 (again, unless extended).

II

This Action Is Premature, and the Complaint Is Speculative, in That Plaintiff Has Not Been Determined Ineligible to Continue Working as Long as She Wishes.

The plaintiff herein cannot allege that she is not being allowed by the District to work as long as she wishes, because she has not obtained a determination by the District's physician as to her physical condition. Only after such a determination can the application of the District's policy to the plaintiff be ascertained.

It is completely speculative to assert at this point that the District either will or will not permit Mrs. Berg to teach later than 30 days before her expected date of delivery.

On the basis of the above arguments, Defendants urge the Court to deny plaintiff's application for a temporary restraining order.

John B. Clausen, County Counsel

[U.S. District Court title omitted in Printing]

AFFIDAVIT OF SAM TEESE OPPOSING GRANTING OF TEMPORARY RESTRAINING ORDER

Sam Teese, being duly sworn, deposes and says:

1. I am the Assistant Superintendent for Personnel of the Richmond Unified School District. I am acquainted with Mrs. Sonja Lynn Berg and am familiar with the records of the District concerning her.

2. Mrs. Berg has represented to the District that she is pregnant and that her expected date of delivery is March 24, 1973.

3. The Richmond Unified School District's present maternity leave policy provides, in part, as follows:

> "Maternity leaves must become effective no later than the start of the seventh month of pregnancy." (Section 131.10, ¶2)

4. Revision of said policy is presently being negotiated by the District and the Certificated Employee Council.

5. On December 13, 1972, the Governing Board of the District authorized the Superintendent and me, on an interim basis, to receive applications by pregnant employees to work beyond the start of the seventh month of pregnancy, and to grant exceptions to the present policy in appropriate cases.

6. Pursuant to said authorization by the Board, I have informed pregnant employees that they may continue to work no later than 30 days before their expected date of delivery. I have also informed them that they may work longer if both of the following

conditions are met: (1) a physician selected by the District certifies that the employee's continued employment while pregnant is not medically inadvisable and presents no substantial hazard to the District, and (2) it is determined by the District that the employee's performance is not impaired as a result of her pregnancy.

7. In November, 1972, I advised Sonja Berg that the above interim administrative policy might be adopted by the Governing Board. Under that policy her maternity leave will not in any event begin until February 23, 1973.

8. On December 14, 1972, Mrs. Berg requested that her maternity leave begin 30 days before her expected date of delivery.

9. On December 20, 1972, Mrs. Berg informed the District that she wished to work until she and her doctor felt it necessary for her to begin maternity leave.

10. On December 27, 1972, I advised Mrs. Berg that she could be seen by a physician appointed by the District.

11. In accordance with the above-stated interim administrative policy, if a physician selection by the District certified that Mrs. Berg's employment past February 23, 1973, is not medically inadvisable and presents no substantial hazard to the District, the District intends to allow Mrs. Berg to continue working so long as said certification is valid and so long as Mrs. Berg's performance of her duties remains unimpaired.

(Jurat omitted)

[U.S. District Court title omitted in Printing]

NOTICE OF MOTION FOR PRELIMINARY INJUNCTION

To the defendants above-named and to their attorneys of record:

PLEASE TAKE NOTICE that on the 22nd day of February, 1973, plaintiff will move the court for a preliminary injunction enjoining defendants from terminating plaintiff pursuant to defendants' maternity leave policies and further enjoining defendants from otherwise applying those policies against the other members of the class she represents, as more fully set forth in the Complaint and in the Memorandum of Points and Authorities in Support of Preliminary Injunction filed herein. Please take further notice that hearing of this matter shall be held in the Courtroom of Judge Alfonso J. Zirpoli, Seventeenth Floor, Federal Building, Golden Gate Avenue, City of San Francisco, California, at 1:30 P.M. or as soon thereafter as may be heard.

Plaintiff's motion shall be based upon this notice, and the pleadings, records and files of the above-entitled case, and argument and evidence then and there presented.

Dated: February 7, 1973

Mary Cynthia Dunlap
Attorney for Plaintiff

[U.S. District Court title omitted in Printing]

MOTION FOR PRELIMINARY INJUNCTION

Plaintiff moves the court for a preliminary injunction enjoining the defendants, and each of them, their agents, servants, employees and attorneys and all persons in active concert and participation with them, pending the final hearing and determination of this action, from terminating plaintiff and any other member of the class she represents, pursuant to the District's present maternity leave policy, or from otherwise implementing or applying said maternity leave policy to plaintiff or to any other member of the class she represents, on the grounds that:

1. unless restrained by this court, defendants will perform the acts referred to above;

2. such action by the defendants will result in irreparable injury, loss and damage to the plaintiff, as is more particularly detailed in the verified complaint and the affidavit attached to Plaintiff's Memorandum of Points and Authorities in Support of Temporary Restraining Order and Motion for Preliminary Injunction;

3. the issuance of a preliminary injunction herein will not cause undue inconvenience or loss to defendants but will prevent irreparable injury to plaintiff.

DATED: January 10, 1973

By: Mary C. Dunlap

[U.S. District Court title omitted in Printing]

OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION AND POINTS AND AUTHORITIES

Come now the defendants and oppose the pending motion of the plaintiff for a preliminary injunction and pray that the said motion be denied.

The grounds for the defendants' opposition are as follows:

I

As to the alleged class the motion for preliminary injunction is not properly before the Court in that no order has been made under Rule 23 determining whether a class action may be maintained.

II

On the facts before the Court there exists no showing of *certain* and *irreparable* injury to the plaintiff justifying a preliminary injunction in favor of the plaintiff or anyone else, as against the harm such an injunction could work to the District.

III

On the facts before the Court, the District's revised interim provisions for exceptions from maternity leave policy, including the right of the Assistant Superintendent to require a medical report from a physician selected and paid by the District, do not violate any right under the laws or Constitution of the United States of America, the plaintiff or of anyone else.

IV

In any event, the Court should abstain from exercising any jurisdiction in this case on the ground that the constitutional validity of California law respecting teachers' maternity leaves has not been litigated in the state courts.

Said opposition is based upon this pleading, the affidavits and points and authorities filed herewith and in opposition to the plaintiffs' motion for temporary restraining order, the proposed order attached hereto, and the pleadings, records and papers on file in the above entitled action.

John B. Clausen
County Counsel

POINTS AND AUTHORITIES

The Court should not grant injunctive relief respecting the alleged class.

The affidavits before the Court do not demonstrate any individual other than Sonja Berg who objects to the policies of the District or who claims any violation of her rights. The Court has made no order under Rule 23 determining whether the suit may be maintained as a class action.

The Ninth Circuit has ruled that determination of the existence of a class must be accomplished under Rule 23 and not in the context of other procedures. *Gillibeau v. City of Richmond,* 417 F.2d 426 (9th Cir. 1969). Notwithstanding that for purposes of dismissal and a ruling as to jurisdiction a class action is assumed when pled, prior to ruling under Rule 23, *City of Inglewood v. City of Los Angeles,* 451 F.2d 948 (9th Cir. 1972), that assumption does not warrant the granting of orders directly affecting the purported class, prior to a Rule 23 determination. *Dorfmann v. Boozer,* 414 F.2d 1168 (DC Cir. 1969).

II

The Court should not grant injunctive relief because certain and irreparable injury to the plaintiff is not demonstrated on the affidavits, and harm to the District is demonstrated.

> "It is well established that in order to obtain a preliminary injunction, the plaintiff must (demonstrate) . . . that denial of the injunction will

> cause certain and irreparable injury to the plaintiff."
>
> *Ordway v. Hargraves,* 323 F.Supp. 1155 at 1156 (DC Mass. 1971)

> "The great equitable power to enjoin a party *pendente lite* should not be exercised unless it is manifest that the normal legal avenues are inadequate, that there is a compelling need to give the plaintiff the relief he seeks, and that the injunction will not wreak greater harm on the party enjoined."
>
> *Dorfmann v. Boozer, supra,* 414 F.2d 1168 at 1174

It is evident from the affidavits that the District has not to this day made a final determination as to the day when Mrs. Berg's maternity leave must begin. The District's interim policy does not irrevocably mandate a fixed time for the beginning of maternity leave, but allows for individualized determination based upon a teacher's physical condition and the district's legitimate interests.

The only bases upon which Mrs. Berg can claim any injury are the reserved rights of the District under its policy a) to determine the date for commencement of maternity leave and b) to require a medical report from its own doctor. The existence of these rights does not work any injury as to Mrs. Berg. It is only their application that can give rise to a claim of harm, and they have not been applied. Unless her own doctor is willing and able to provide a report demonstrating a medical basis justifying

her continued employment after 30 days before her estimated term, the reserved rights of the District are not at issue.

On the other hand, granting injunctive relief will harm the defendants in several significant respects:

a) It will disable the District from taking action to minimize the disruptive effect of Mrs. Berg's impending absence upon her class. (Sam Teese's affidavit)

b) It will disable the District from taking action to obtain the best available substitute for her. (Sam Teese's affidavit)

c) It will expose the District to a high risk of disruption, inconvenience and liability. (Maxwell Thebaut's affidavit)

d) It will expose her students and classes to a high risk of disruption, inconvenience and neglect. (Sam Teese's affidavit and Maxwell Thebaut's affidavit)

III

The plaintiff is not entitled to injunctive relief.

There are only two elements of the District's interim maternity leave policy that are contested in the motion for preliminary injunction. They are the right of the District to make a final determination as to the date of commencement of maternity leave and the right of the District to require a medical report from its own physician.

The affidavit of Sam Teese demonstrates that the right of the District to control the commencement of maternity leave is mandated by its need to maximize educational continuity and its capacity to obtain the

best available long term substitute teachers. These considerations, alone, have been held to justify a much more rigorous maternity leave policy by the en banc decision of the Fourth Circuit Court of Appeals in *Cohen v. Chesterfield County School Board,* 467 Fed.2d 262 (4th Cir. 1973), a copy of which is appended hereto.

The affidavit of Dr. Maxwell Thebaut demonstrates that the right of the district to determine a commencement date for maternity leave and to require a report from its own physician are medically justifiable to the point of prudent necessity.

In her suit for injunctive relief, Mrs. Berg claims a constitutional right to personally determine the beginning time of her maternity leave in consultation with her personal physician. As demonstrated by Exhibit E to her complaint, her physician stated unequivocally to the District on December 6, 1972 that Mrs. Berg could continue to work until the date of her confinement, March 25, 1973. It hardly requires expert testimony to conclude that a December assessment of the physical condition of a pregnant woman to a point in time four months in the future, is dubious. Dr. Thebaut has stated that a medical report more than two weeks old is not reliable with respect to a woman in late pregnancy, and that a medical report certifying a teacher to work until the date of her confinement would be inconsistent with prudent medical practices. In the face of this evidence, it is not conceivable that a Court could hold that the District may not require a medical report from a physician of its choosing. It would probably be negligent if it failed to obtain such a report.

In addition, Dr. Thebaut's affidavit sets forth multiple serious risks that would be presented to the District and to her classes if Mrs. Berg was enabled to continue work as long as she pleased into a condition of late pregnancy.

Whatever test the court should choose to apply, the defendants contend that the interests of Mrs. Berg's students in their educational program, in the quality of their substitute, and in avoiding a medical emergency in the classroom; and the interest of the District in avoiding undue disruption of Mrs. Berg's class and the serious risk of a medical emergency at school, compel the conclusion that the plaintiff is not entitled to a preliminary injunction.

IV

The Court should abstain.

The questions presented by this suit are original questions that have not been passed upon by the appellate courts of California. Maternity leave is specifically authorized by Section 13456 of the California Education Code.

The doctrine of abstention is applied in all federal court actions to obtain sanctions respecting state statutes, and regulations and practices thereunder. It provides that the federal courts must avoid the determination of federal constitutional questions arising in the context of state law when the law of the state is in doubt. *Romero v. Coldwell,* 455 F.2d 1163 (5th Cir. 1972)

John B. Clausen
County Counsel

[U.S. District Court title omitted in Printing]

AFFIDAVIT OF SAM TEESE IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

Sam Teese, being duly sworn, deposes and says:

1. I am Assistant Superintendent for Personnel of the Richmond Unified School District, and make this affidavit in such capacity.

2. This affidavit supplements the affidavit heretofore given to me, opposing granting of temporary restraining order in the above-entitled action, which said affidavit is incorporated herein by reference.

3. Pursuant to authorization by the Governing Board of the Richmond Unified School District, on February 16, 1973 the District Superintendent and I issued revised interim provisions for exceptions from maternity leave policy, providing as follows:

"Maternity leave shall begin at least 30 days before the expected date of delivery unless the Assistant Superintendent of Personnel determines a different beginning date, as follows:

A. The Assistant Superintendent may determine a beginning date for an employee's maternity leave earlier or later than 30 days before the expected date of delivery, taking into account the available medical information, the employee's job performance, and the interests and requirements of the district, its schools, classes, and pupils.

B. In any case in which he deems it advisable, the Assistant Superintendent may require a pregnant employee to obtain a medical report from a physician selected and paid by the District.

C. A request for continued employment at the convenience of the employee shall be made to the Assistant Superintendent at least one month prior to the date on which maternity leave would ordinarily begin. The request must be followed by a statement from the employee's physician current within two weeks of the ordinary leave date, including the following information.

a) The expected date of delivery, and the date to which the physician recommends continued employment.

b) A statement as to whether the pregnancy is unusual in any respect.

c) A statement as to the current health of the employee and the fœtus.

d) A statement as to whether the employee is able to continue her employment to the given date without risk to the employee, the fœtus or the District, given that the employment may include the following factors:

Maintaining control and direction of approximately 30 active students.

Staying with a class for periods of not less than one hour without interruption.

Undergoing jostling and bumping incident to the movement of students on school premises.

Supervising games and sports of students.

Coping with student fights, accidents and illnesses.

Driving to and from work.

D. If an employee disagrees with the determination of the Assistant Superintendent she may appeal in writing to the District Superintendent stating her reasons for such disagreement."

A copy of the revised interim provisions was delivered to Sonja Berg on February 16, 1973. If a medical report conforming to part C and recommending continued employment is received on or before February 23, 1973, Mrs. Berg's employment may continue to March 2, 1973, pending a medical report from a District selected physician if I should require it, and my determination as to a beginning date for her maternity leave.

4. I am informed and believe and on that basis state that Robert F. Tomfohrde is not a medical specialist in the fields of obstetrics or gynecology.

5. Teachers in the Richmond Unified School District are, inter alia, subject to the following conditions with respect to their employment:

a) Teachers are usually required to maintain control and direction of approximately 30 active students.

b) Teachers are usually required to remain with their classes for periods of up to one hour or more without interruption.

c) Teachers usually undergo jostling and bumping, sometimes on stairways, incident to the movement of students on school premises.

d) Teachers are usually required to supervise student games and sports.

e) Teachers are usually required to cope with minor emergency situations including, but not limited to, student fights, accidents, and illnesses.

f) Teachers usually drive to and from work.

The aforementioned conditions are specifically applicable with respect to Sonja Lynn Berg.

5. The regulations of the Richmond Unified School District provide for physical or mental examinations of teachers by a District approved physician at District expense whenever the District Superintendent concludes that such an examination is required for the safety or welfare of students or school employees.

6. Neither Sonja Lynn Berg or any other employee of the Richmond Unified School District is subject to termination of her employment by virtue of maternity leave.

7. Maintaining continuity of the educational process is a fundamental policy of the Richmond Unified School District and an essential element in any educational program. Maternity leaves usually last for periods longer than six weeks and materially interfere with continuity of education in the affected classes. One objective of the District in determining the dates for commencement of maternity leave is to schedule such leave, if practicable, to complement elements of the continuity of classroom instruction such as semester breaks, Christmas and spring vacations, report card periods, or units of study. This objective requires that the district retain ultimate control as to the commencement of maternity leave. Sick leaves

rarely last for more than one week. The over-all impact of sick leave on continuity of the educational process is much less than that of maternity leave.

8. When a teacher is required to be absent, a substitute teacher is provided by the District for her class. Maternity leave absences require substitutes for prolonged terms, which is not the case as to the great majority of sick leave absences. The District always tries to obtain the best qualified and most competent substitute teachers available to it. This is a particularly significant consideration in the case of long term absences. Desirable substitute teachers for long term classes are difficult to obtain and there is competition between different school districts for their services. The ability of the Richmond Unified School District to determine predictable dates for the commencement of maternity leave materially improves its capacity to obtain desirable substitute teachers. Factors limiting the capacity of the District to determine such predictable dates will impede its ability to obtain the best available substitute teachers for the classes left by teachers on maternity leave.

Sam Teese

(Jurat omitted)

[U.S. District Court title omitted in Printing]

AFFIDAVIT OF MAXWELL THEBAUT IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

Maxwell Thebaut, being duly sworn, deposes and says:

1. I am a physician, licensed to practice medicine in the State of California. I am a specialist in the medical fields of obstetrics and gynecology, certified by the American Board of Obstetrics and Gynecology. I have practiced my medical specialty continuously since 1933 to the present excepting for four years during World War II. My offices are in Oakland, California.

2. I have been retained by the Richmond Unified School District to give my opinion respecting aspects of the employment of pregnant teachers during the late period of their pregnancy. In referring to "late" pregnancy I mean the six weeks prior to an estimated date of delivery.

3. In giving my opinion I have taken into account the following specific factors in addition to my experience, medical knowledge and general knowledge respecting schools and teachers:

a. That a teacher is usually required to maintain control and direction of approximately 30 active students.

b. That a teacher is usually required to remain with her class for periods of up to one hour without interruption.

c. That a teacher usually undergoes jostling and bumping, sometimes on stairways, incident to the movement of students on school premises.

d. That a teacher is usually required to supervise student games and sports.

e. That a teacher is usually required to cope with minor emergency situations including but not limited to student fights, accidents, and illnesses.

4. In my opinion a teacher in late pregnancy presents a high degree of risk with respect to the sudden onset of spontaneous medical emergencies. Common emergencies are:

a. placenta previa: sudden onset of severe bleeding;

b. placenta abruptio: premature separation of the placenta from the uterine wall;

c. rupture through the scar of previous caesarean operation;

d. breaking of the bag of water.

Emergencies of the kind described above commonly occur in up to 20% of all pregnancies, cannot be anticipated, are disabling, and require prompt medical attention.

5. In my opinion a teacher in late pregnancy is likely to be temporarily disabled or required to leave her class suddenly and unexpectedly, on a temporary or indefinite basis as the result of conditions present in normal pregnancies, some of which are:

a) urination—In virtually all pregnancies frequent and uncontrollable urination is required as a result of pressure by the fœtus on the bladder.

b) incontinency—In approximately half of all pregnancies, incontinency is present or may be precipitated by sneezing, coughing, jumping, or like stresses.

c) false labor—In somewhat less than half of all pregnancies false labor occurs in the last month prior to delivery.

d) true labor—In all pregnancies, the time when true labor will begin cannot be predetermined absent induction of labor.

6. In my opinion a teacher in late pregnancy presents a high degree of risk with respect to medical emergency and harm to herself and her fœtus:

a. When she undergoes ordinary jostling and bumping incident to the movement of students on school premises;

b. When she is required to supervise student games and sports;

and that such risk is greatly increased when such jostling and bumping or games and sports take place on stairways.

These risks exist because a woman in late pregnancy suffers an abnormal distribution of her body weight. As a result, women in late pregnancy are often awkward and uncertain when standing or walking. These problems are magnified if inappropriate footwear is worn. Women in late pregnancy are

peculiarly vulnerable to even modest elements of jostling and bumping that commonly occur in the movements of crowds of people and in the course of games and sports. Any of the conditions heretofore described could be precipitated by such jostling, bumping, or falling incident thereto.

7. In my opinion a teacher in late pregnancy can be expected to have unusual difficulty in coping with minor emergency situations such as student fights, accidents, and illnesses.

The physical awkwardness that is present in late pregnancy will in most cases make it difficult for a teacher to respond in situations calling for sudden movement and exertion. Urination or incontinency could easily be precipitated by actions, such as bending or lifting, that she might be required to take. A teacher could easily become so disabled by her own movements or a minor blow, that she would be helpless to take any effective action.

8. It is my opinion that with respect to virtually all pregnancies an exact predictive date for delivery cannot be determined. Among the factors creating uncertainty with respect to the date of delivery are the following:

a) The term of a normal pregnancy is variable within a range of from 260 to 300 days from conception.

b) The date of conception is rarely ascertainable.

9. It is common practice in the medical profession to estimate a delivery date based upon Nagele's

rule (266 days from conception) and an estimated date of conception. It is commonly recognized in the medical profession that such estimated dates are not exact and that delivery can be expected at any time from two weeks before to two weeks after a date so calculated.

10. In my opinion, considering a teacher of average stamina, health and normal pregnancy; a rule requiring her to stop working at least six weeks prior to her estimated date of delivery would be consistent with conservative medical practice, and most specialists in obstetrics and gynecology would recommend against her continuing to work within four weeks of her estimated date of delivery.

11. In my opinion, a medical report more than two weeks old would not be a reliable statement of the condition of a woman in late pregnancy, and any medical report stating that a pregnant teacher may work until the date of her confinement would be inconsistent with prudent medical practice in the specialty of obstetrics and gynecology.

12. In the medical profession it is recognized that normal pregnancy is a natural condition and not an illness resulting from any injury, infection, malfunction or disfunction of the body.

13. It is my opinion that more than 85% of all deliveries are the result of voluntary pregnancies and that proportion of voluntary pregnancies is increasing.

Maxwell Thebaut, M.D.

(Jurat omitted)

[U.S. District Court title omitted in Printing]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF TEMPORARY RESTRAINING ORDER AND OF MOTION FOR PRELIMINARY INJUNCTION

I. Introduction

This class action seeks injunctive and monetary relief for the deprivation of constitutional and statutory rights guaranteed to plaintiff and to all members of the class she represents under the Fourteenth Amendment to the Constitution and under Title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000e et seq. Plaintiff alleges that, unless restrained from so doing, defendants, and each of them, will terminate plaintiff arbitrarily and capriciously from her employment as a school teacher in defendant District on February 24, 1973, a full month prior to the expected date of her confinement, despite her doctor's determination that she is wholly capable of continuing work until March 23, 1973. The federal court for the Northern District of California decided almost one full year ago that maternity leave policies which discriminate against females in the fashions described hereinafter are repugnant to the Fourteenth Amendment's guarantee of equal protection of the laws. Williams v. San Francisco Unified School District, 340 F. Supp. 438 (1972, opinion and order for preliminary injunction). Since that decision, other federal jurisdictions have followed the reasoning of the *Williams* court. See part II., *infra,* of this memoradum.

By this action, plaintiff also seeks to prevent further application of defendant District's current maternity leave policies as against other female employees who are members of the class she represents, and plaintiff seeks to obtain monetary damages arising from application of the unlawful maternity leave and sick pay policies of defendants to herself and to the class she represents.

II. Facts

Plaintiff Sonja Lynn Berg ("plaintiff") is a teacher of kindergarten children at the Stege School of defendant Richmond Unified School District ("District"). Plaintiff has been employed by defendant District for at least six (6) years.

On or about December 6, 1972, plaintiff's attending physician, Dr. Robert Tomfohrde, informed defendants by a letter to Mr. Sam Teese, Assistant Superintendent of Personnel of the defendant District, that plaintiff could be expected to deliver her baby on or about March 24, 1973. Dr. Tomfohrde indicated in that letter that plaintiff was medically able to teach until the expected date of her confinement. See Exhibit "E" of plaintiff's Complaint. By affidavit of Dr. Tomfohrde notarized and sent to defendants in early January, 1973, it was repeated that plaintiff was and is medically able to continue teaching until March 24, 1973, which affidavit is hereto appended as Exhibit "A".

Until December 13, 1972, defendant District had a maternity leave policy that compelled every pregnant

employee to commence leave on or before the first day of the seventh month of pregnancy. See Exhibit "A" of plaintiff's Complaint. At meetings in late November and early December, defendant Board adopted an "interim" maternity leave policy, described by defendant Superintendent W.W. Snodgrass as permitting individual consideration of requests by employees for extension of the pre-leave period beyond the seventh month line. See Exhibits "B" and "C' of plaintiff's Complaint.

For plaintiff, the practical application of defendants' "interim" maternity leave policy has been as follows: On or about December 27, 1972, plaintiff was invited by letter to submit to a medical examination by a District-appointed physician, in order to determine whether her request for an extension from the defendants' compulsory leave policy would be permitted in her case. See Exhibit "G" of plaintiff's Complaint. In that letter, defendants indicated that even were a physician appointed by them to approve such an extension, the District reserved the right to compel plaintiff to leave at an earlier time "should liability or educational program become a consideration".

In early January, 1973, by letter from her attorney, plaintiff refused to submit to said prerequisite examination in order to gain a conditional extension of her pre-leave period. See Exhibit "H" of plaintiffs Complaint. In that letter, plaintiff's counsel offered to join in a conference with legal representatives of defendants about defendants' maternity leave policies. To the date of this filing, neither defendants nor any

of their representatives have made any effort to contact plaintiff's attorney to arrange such a conference. Therefore, it must be concluded that every practicable means of extrajudicial resolution of the rights of plaintiff and those of the affected class has been exhausted by the plaintiff here.

III. This Court Has Personal and Subject Matter Jurisdiction in This Action.

Jurisdiction over the Complaint and Prayer in the instant case is conferred on this Court by Title 28 of the *United States Code,* section 1343(4) of which provides that this court shall have original jurisdiction in every action authorized by 42 U.S.C. section 1983, which provides for redress of constitutional and civil rights deprived under color of state law. This court has already recognized its jurisdiction over the parties and subject matter of this action, by virtue of the identity of its authority herein with its jurisdictional authority as recognized in *Williams, supra,* 340 F.Supp. 438 at 441.

Jurisdiction is also conferred on this court by section 2000e-5(f) of Title 42 of the *United States Code,* which gives original jurisdiction to this court in all actions authorized by 42 U.S.C. 2000e et seq., known as Title VII of the Civil Rights Act of 1964, which provides for injunctive and other relief against discrimination in employment on account of race, religion, national origin or sex.

IV. The Decision of This Jurisdiction in *Williams v. San Francisco Unified School District* Fully Sustains Every Claim of Plaintiff Herein as to the Denial of her Constitutional Rights by Defendants' Maternity Leave Practices as Described Herein.

As in *Williams,* it is the arbitrary and sex-stereotyped line-drawing of defendants' maternity leave policy that affronts the equal protection clause in the case at hand. The interim maternity leave policy of defendants, adopted on December 13, 1972, utilizes the first day of the seventh month of pregnancy as a general norm for the commencement of a compelled maternity leave. See Exhibit "B" of plaintiff's Complaint. In order for plaintiff or any other pregnant employee to escape the irrational and discriminatory effects of that seventh-month line, she must prove herself an exception to the stereotype of inability of 7-months pregnant employees that the interim policy incorporates.

As plaintiff herein has discovered, escape for a pregnant employee from that stereotype is hardly easy. Her own doctor's affidavit of her ability to continue teaching has been found unsatisfactory. Her own proclamations of ability and desire to continue teaching beyond the arbitrary leave date imposed upon her by defendants have proved unavailing. As in Williams, "the District has singled out pregnancy as the subject of the restrictive provisions of its mandatory leave policy" *Williams, supra,* 340 F.Supp. 438 at 441.

And, as in *Williams,* the policy of defendants lacks rational basis, as minimally required for the equal protection for plaintiff and her class. When the application of defendants' leave policy, which purports to treat pregnant employees individually, is examined as to plaintiff herein, its utter irrationality is illumined. In the instant case, not a single indicia of plaintiff's incapacity to teach safely and effectively until March 24, 1973, is evident. Rather, the available evidence shows that the absolute contrary proposition is true, as plaintiff's doctor has determined. See Exhibit "A" appended hereto. To presume plaintiff's incapacity in the face of this evidence, to ignore all available evidence, and to make the presumption of her incapacity turn upon examination by a District-appointed physician surely does not constitute a rational plan for effectuating the purposes recited in defendants' letter to her, to wit, to insure educational effectiveness and to minimize alleged risks of District tort liability. When the feature of such a District-appointed physician's relatively superficial knowledge of plaintiff's medical condition, in contrast to that of her own doctor, is added to the configuration of defendants' maternity leave policy as applied herein, the irrationality of that means of advancing those alleged purposes of defendants is underscored.

Even if a rational nexus between defendants' means and ends could be demonstrated herein, that nexus could not sustain their policy in violation of the rights of plaintiff and her class to continue working free of invidious discrimination. Because the right of

plaintiff and her class to employment unencumbered by invidious discrimination must be constitutionally assured, only a "compelling governmental interest" could save the maternity leave policy at issue in this action. *See Williams,* 340 F. Supp. 443.

In scrutiny of the maternity leave policy of defendants herein, no such "compelling governmental interest" emerges. Like the defendants in *Williams,* defendants in this case have posited a variety of interests that are conceptually legitimate. See Exhibit "G" of plaintiff's Complaint. Yet the relationship between those interests and defendants' policy is oblique, at best. Assuming that educational effectiveness is the strongest of the governmental interests recited, the means by which a mandatory leave, or District-appointed physician's approval and a somewhat later mandatory leave, will operate to advance educational effectiveness among pregnant teachers is difficult to comprehend.

Furthermore, defendants' maternity leave policy isolates a class of employees, by sex, for peculiarly burdensome treatment. Hernia patients, about whom stereotypes could easily be developed with respect to tort liability or educational effectiveness, face no hurdles in their requests for leave that in any sense compare to the barriers to pregnant employees under defendants' leave policies. See Exhibit "B", appended hereto, consisting of section 131.07 of defendants' health and injury leave regulations. Thus, the emerging principle of equal protection that sex-discriminatory state action is *prima facie* unconstitutional would

apply to vindicate the rights of pregnant employees in the instant case. The primary reason for that still-nascent but strong principle is that sex, like race and lineage, is a category that courts should treat as suspect in every instance where it is incorporated into state action which disproportionately burdens persons of one sex or the other. As perceived by Justice Raymond Peters for a unanimous California Supreme Court:

> "Laws which disable women from full participation in the political, business and economic arenas are often characterized as 'protective' and beneficial. Those same laws applied to racial or ethnic minorities would readily be recognized as invidious and impermissible."
>
> *Sail'er Inn v. Kirby,* 5 C.3d 1, 485 P.2d 529 (1971).

Because the actions of defendants herein cannot survive the first-level test of equal protection to plaintiff, by a showing of "rational basis" for the defendants' maternity leave line and physician prerequisite, these issues as to the compelling governmental interest required to be shown at the second level of equal protection need not be reached by this court. However, in the light of the arguments offered above, plaintiff submits that defendants' maternity leave policy would fail that more rigorous test, if examined, whether because of the presence of a fundamental right or because of a suspect category, against that higher order of the equal protection guarantee.

V. The Reasoning of *Williams* Has Been Supported in Maternity Leave Decisions Rendered Since *Williams,* of Other Federal Jurisdictions.

In *Heath v. Westerville Board of Education,* 345 F. Supp. 501 (D.C. Ohio, 1972), Judge Carl Rubin determined that a pregnant teacher who had been terminated for failure to take her leave at the end of her fourth month of pregnancy must be reinstated, with full back pay and all "fringe" benefits. Judge Rubin's reasoning tracks the thinking of Judge Harris in *Williams,* particularly where Judge Rubin determines that "(i)t is the very inflexibility" of the maternity policy in that case that offends the Fourteenth Amendment. *Heath, supra,* 345 F. Supp. at 505.

In the instant case, the inflexibility of defendants' policy is not mitigated by its alleged consideration of individual cases, nor by its later line of mandatory leave, as compared with the line at issue in *Heath.* Plaintiff and her class herein are as thoroughly victimized by a rigid stereotype about their incapacity to continue working as were plaintiff in *Heath* and *Williams;* in this case as in those the medical needs and personal wishes of pregnant employees, as distinct persons, are being ignored.

In *Cohen v. Chesterfield County School Board,* 467 F.2d 262 (4th Cir., 1972), Judge Winter articulated the constitutional objection to such policies as that of defendants herein most strongly. In that case, Judge Winter found no reason to support a forced leave at

any time when the employee teacher and her own doctor conclude that "she can perform her duties beyond that [compelled leave] date." 467 F.2d at 265.

The federal policy enunciated by the Fifth Circuit Court of Appeals in *Schattman v. Texas Employment Commission,* 459 F.2d 32 (1972) has furthermore been clarified by Congress since the decision in *Williams* was announced. Title XII of the 1964 Civil Rights Act has been amended to include agencies such as defendant T.E.C. of that case as employers for Title VII purposes, in H.R. 1746, the Equal Employment Opportunity Act of 1972. *Cf.* discussion of of the amendments at p.H1861 of the *Congressional Record* (March 8, 1972). Thus, any conceivably reasonable foundation for *Schattman* that might have existed, before *Williams* was decided, has since disappeared. Also since *Williams,* the case of *LaFleur v. Cleveland Board of Education* was reversed, by the Court of Appeals for the Sixth Circuit, which struck down an eighth month maternity leave policy that the trial court had upheld on the ground of extraordinary dangers to pregnant teachers in Cleveland. 465 F.2d 1184 (6th Cir., 1972, reversing 326 F.Supp. 1208 (Ohio, 1971)). Finally, in the decision of *Robinson v. Rand,* a federal district court for Colorado has called the decision of *Struck v. Sec'y of Defense* into serious question, by holding that a pregnant W.A.F. could not lawfully be discharged. 460 F.2d 1372 (D.Colo., 1972).

To summarize, the palpable trend of federal decisions since *Williams,* which plaintiff contends should determine this case in her favor, serves to uphold

the rationale of *Williams.* Those factors of sex discriminatory operation of mandatory maternity leave isolated by this jurisdiction in *Williams* have served as guideposts to other federal courts facing similar claims.

VI. Defendants' Maternity Leave Policies Violate Title VII of the Civil Rights Act of 1964.

The arbitrary leave line and physician prerequisite of defendants' maternity leave policies at issue herein contravene Title VII, section 703 (a) of the 1964 Civil Rights Act, 42 U.S.C. 2000e- 2(a), which provides in pertinent part:

> "(a) Employer practices.
>
> It shall be an unlawful employment practice for an employer -(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's * * * sex * * *; or
>
> -(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's * * * sex, * * *."

The adverse effects upon plaintiff and the class that she represents herein, caused by defendants' classification of pregnancy as an extraordinary form of noncompensable, automatic disqualifier from employment, include loss of wages, interference with the right to

work free from invidious classifications, and stigmatization on account of sex.

As the Guidelines of the Equal Employment Opportunity Commission on Title VII indicate, defendants' policies herein are totally insupportable under the Civil Rights Act of 1964. These Guidelines are proper authority for the interpretation of Title VII and, according to the United States Supreme Court, are "entitled to great deference." Griggs v. Duke Power Co., 401 U.S. 424, 91 S. Ct. 849, 28 L.Ed. 158 (1971); see also, Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir., 1971).

In application to the specific case at hand, the Guidelines provide relevantly as follows:

> "Section 1604.10 Employment Policies Relating to Pregnancy and Childbirth
>
> (a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy is in *prima facie* violation of Title VII."
>
> —37 *Fed. Register* 6835 et seq.

Under Section 1604.10(a) of the Guidelines, the *mandatory* nature of any maternity leave policy subjects that policy to challenge under Title VII, for a mandatory policy that isolates employees for exclution because of pregnancy, even for a temporary period, categorizes on account of sex in a disadvantageous fashion that directly contradicts the terms and purpose of Title VII, quoted above. See also, Guideline section 1604.2 (b) (1).

Guideline section 1604.10(b) further prohibits the treatment of childbirth or pregnancy differently than all other temporary disabilities. As that section in part provides,

> ". . . policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities."

In defendants' distinctive treatment of pregnancy, in terms of commencement and duration of leave at the discretion of defendants and exclusion of pregnancy from usual sick leave pay, accrued and otherwise, there is a series of clearcut violations of Title VII as implemented by the above-cited Guideline. Compare defendants' regulation 131.07(5), hereinafter appended as Exhibit "B", with the unwritten exclusion of plaintiff and other pregnant employees from that benefit, as declared by Mr. Sam Teese; *see* section XV of plaintiff's Complaint.

It cannot be questioned that defendants, and their agents, as local governmental agencies and officials, are encompassed by the definition of "employer" given to that term by the 1972 Amendments to Title VII, passed by Congress in the form of the Equal Employment Opportunity Act of 1972 (H.R. 1746). *See* sections 701 (a) -(c) of Title VII of the 1964

Civil Rights Act (as amended, March, 1972; see also, discussion of the applicability of the Title to local government, at p. H 1861 of the *U.S. Congressional Record* (March 8, 1972).

VII. This Is a Proper Class Action and Plaintiff Sonja Lynn Berg Legitimately Represents the Class on Whose Behalf It Is Brought.

Just as the plaintiff sought to enjoin the sex-discriminatory maternity leave policies of defendants in *Williams, supra,* plaintiff herein seeks an injunction against the application of defendants' maternity leave policies, as against herself and every other qualified employee of defendant. Rule 23 of the *Federal Rules of Civil Procedure* permits this class, just as it was found to allow an identically constituted class in *Williams.*

Plaintiff is uncertain as to the exact numbers of persons who are presently or prospectively vulnerable to defendants' discriminatory policies sought to be enjoined here. As a large and metropolitan school district, there must be thousands of such employees.

As in *Williams,* the common legal tie of all members of this class is composed of their mutual susceptibility to discrimination on account of sex, caused by defendants' maternity leave and sick pay policies. Plaintiff, as a pregnant employee of defendants who is presently endangered by the enforcement of the policies at issue herein, is dedicated to the full and fair representation of all members of the class affected by those policies.

Furthermore, like *Williams,* the defendants herein are acting in the formulation and enforcement of their maternity and sick leave policies against this class as a whole. Thus, final injunctive relief to the entire class will be appropriate, as is required by Rule 23 (b) (2) and (3).

VIII. Plaintiff's Complaint Properly Supports Issuance of Temporary and Permanent Injunctions, to Restrain Further Enforcement of Defendants' Maternity Leave Policies Against Plaintiff and All Other Members of the Affected Class Herein.

Injunction of the type and for the purpose prayed for by plaintiff in her Complaint has already been construed as a proper and valid remedy to prevent the deprivation of constitutional rights sought to be protected by this action. *See Williams, supra,* 340 F. Supp. 438 at 449. The status quo in the instant case will not be preserved if the injunctive relief prayed for herein is denied. Defendants will terminate plaintiff on February 24, 1973, which date is but three weeks from the date of this filing. Impairment of the status quo in the instant case entails irreparable injury to plaintiff, for the deprivation of her right to employment by the compulsory leave threatened by defendants cannot be measured by money nor could it be adequately remedied at law.

IX. At Most a Nominal Bond Should Be Set by This Court as the Result of the Grant, If Any, of This Complaint for Injunctive Relief, If Any Such Bond Be Set.

Rule 65 of the *Federal Rules of Civil Procedure* requires that a bond be set for and upon the issuance of a temporary restraining order or a preliminary injunction. This Court has discretion as to the amount of said bond. Ferguson v. Tabah, 288 F.2d 665 (2d Cir., 1961).

Plaintiff urges this court to set any such bond at a nominal amount. No material damage will accrue to defendants by the grant of injunctive relief as prayed for by plaintiff herein. Furthermore, a bond of any great amount will prove great hardship to plaintiff herein, who is not possessed of sufficient funds to support a large bond in this action.

X. Conclusion

The maternity leave policies of the Richmond Unified School District, which compel unpaid leave for maternity at a date and for a period that is arbitrary and that is in the sole discretion of defendants, without regard to the medical conditions or personal plans of individual persons employed by defendants, discriminate invidiously against the class represented by plaintiff in this action, including plaintiff herself, in violation of the Fourteenth Amendment to the United States Constitution and in contravention of Title VII of the Civil Rights Act of 1964. Defendants' application of these policies to plaintiff and others threatens irreparable injury to plaintiff and to each such other employee without adequate legal remedy for that harm.

Therefore, plaintiff respectfully requests that this court grant a preliminary injunction restraining the District, by and through its individual agents and employees including defendants hereto, from terminating plaintiff or any other member of the class she represents, pursuant to the District's maternity leave policies, or from otherwise implementing or applying said maternity leave policy or any other policy in disregard of the individual medical needs and personal wishes of plaintiff and of every other employee subject to said implementation or application.

Dated: January 28, 1973

Mary Cynthia Dunlap
Attorney for Plaintiff

Exhibit "A"

[U.S. District Court title omitted in Printing]

AFFIDAVIT OF DR. ROBERT TOMFOHRDE

Dr. Robert Tomfohrde, being duly sworn, deposes and says:

I am a medical doctor. I am familiar with Sonja Lynn Berg, as she has been under my care during her pregnancy.

As of this date there is no medical contraindication for this patient, Sonja Lynn Berg, to work as a teacher until the date of her confinement, March 24, 1973.

Dr. Robert Tomfohrde, M.D.

Dated: Dec. 21, 1972

(Jurat omitted)

Exhibit "B"

. . .

Section 131.07 Health and Injury

1. Health Leave

   1.1 Any certificated employee classified as a permanent employee may be granted an extended leave of absence with or without use of pay at discretion of employee for purposes of health, rest and recuperation. Extended leave may be granted for a six months or one-year period to correspond as nearly as possible with the schedule of the school year.

   1.2 Upon request of the Superintendent, the employee shall provide a health affidavit from a licensed physician to verify the need for the requested health leave.

   1.3 Prior to the granting of a health leave, the Governing Board may require a physical examination to be performed by a physician selected by the Governing Board. Such examination shall be at no cost to the employee.

2. No salary or sick leave deduction is made for absence due to contagious disease, which may be presumed to have been contacted during the performance of school duties with other persons having a contagious disease, for the period of isolation or quarantine.

3. Full time certificated personnel shall be allowed absence from duty because of personal illness or injury for ten (10) full days each school year without loss of salary. Unused days of such leave shall be accumulative with a maximum of ten (10) days per year allowable. (Educational Code Sec. 13468).

4. Personal illness of more than five (5) school days duration shall be verified by a certificate from a licensed physician. Such certificate shall be given to the Principal who shall in turn forward said certificate to the School Health Department.

5. Beyond the number of days of absence allowed for personal illness or injury with full salary, full time certificated employees shall be al-

lowed their regular salary, less the cost of a substitute, for a period of five (5) school months, exclusive of those days in which full salary was allowed. (Education Code, Section 13456). If the difference is less than $3.00 per day, a minimum of $3.00 per day shall be paid the absent employee. The Governing Board will not allow any difference in salary of substitute, and salary of regular employee beyond the five school month period.

REPORTER'S TRANSCRIPT:

Hearing on Motion for Preliminary Injunction, in part:

Thursday, February 22, 1973

[14] MS. DUNLAP: Thank you.

MR. MARCHESI: May the Court please, I think the defendants' arguments are fairly summarized in the points and authorities already submitted. However, I would like to offer some supplemental remarks and to respondent to Ms. Dunlap's arguments this morning.

First of all, if the plaintiff's motion rests on two independent grounds, first Title 7 and secondly the constitutional grounds, then I think we can dispose of the Title 7 ground rather quickly. There's a series of cases set forth clearly in the Annotated Code under Title 7, Section 2000(e)(5), which states that a prerequisite to a suit under Title 7, under that section, under that division, is a notice from the Commission,

the Equal Employment Opportunity Commission, that it has tried to gain compliance of the regulations by the employer but that it has not done so. There has been to my recollection no allegation in the plaintiff's pleadings so far that there has been notice to the Commission that a claim has been made or that any notice has been received. Further—

THE COURT: Do you question the validity of that guideline?

MR. MARCHESI: Well, I think that the Court cannot reach that guideline, since there's been no compliance with the prerequisites.

THE COURT: But at times we have to be reasonable **[15]** persons. If you don't question the reasonableness of the guideline, why not so advise the Board and end the matter?

MR. MARCHESI: Your Honor, if the Court please, I would like to point out a further prerequisite before I answer that question.

THE COURT: Yes.

MR. MARCHESI: In certain States the section that I referred to, Section 2000(e) in Title 42 of the Code states that in States where there's a procedure for obtaining relief from allegedly unfair labor practices, the State's procedures have to be exhausted before going to the Equal Employment Opportunity Commission. Thus in this case the whole procedure under Title 7 has been disregarded and the plaintiff has attempted to forego all of that and come directly to the Court.

. . .

[18] . . .

MS. DUNLAP: I wish to reply briefly to two points, [19] Your Honor.

THE COURT: Yes.

MS. DUNLAP: If Your Honor wishes to know about them. First, the United States Attorney General has authorized issuance of a right to sue letter in this case. I was informed of this fact yesterday by a man named Andrew Ruzicco, who is the Deputy Chief of the Education Section of the Civil Rights Division of the Department of Justice. He telephoned me, I told him he ought to phone the Court. Their letter to sue is sitting there in Washington waiting for a letter from the E.E.O.C. to come there which was mailed last Friday. The right to sue letter will establish without question the jurisdiction of this Court over the Title 7 action. It is not simply a statement of counsel or a general philosophical proposition that this Court has original and sole jurisdiction over Title 7 actions.

. . .

ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION

(Petition for Writ of Certiorari, Appendix C, p. 30)

[U.S. District Court title omitted in Printing]

SUPPLEMENTAL MEMORANDUM REGARDING JURISDICTION

Plaintiff's Complaint for Injunctive Relief and Damages in the above-entitled action is based upon 42 U.S. Code section 2000e et seq., known as Title VII of the 1964 Civil Rights Act, as well as upon the equal protection clause of the Fourteenth Amendment to the U. S. Constitution. (*See* Plaintiff's Complaint, Parts I., III. and XV.; *see also* Plaintiff's Memorandum of Points and Authorities in Support of Temporary Restraining Order and of Motion for Preliminary Injunction, parts I. and III.)

Under Title VII of the 1964 Civil Rights Act, a notice of the right of plaintiff to institute civil action against defendants has been held to be a prerequisite to federal jurisdiction over said action. Cox v. United States Gypsum Company, 409 F.2d 289 (7th Cir., 1969). Said prerequisite to this Court's jurisdiction has been fulfilled in the instant case. A notice of plaintiff's right to sue upon E.E.O.C. complaint No. TSF 3-0929 was issued on February 21, 1973, by Mr. Brian K. Landsberg, Chief of the Education Section of the Civil Rights Division of the United States Department of Justice. That notice is hereto appended, marked "Exhibit A", and is herein incorporated by this reference.

Mary C. Dunlap
Attorney for Plaintiff

Dated: March 1, 1973.

"Exhibit A"

Feb 21 1973

JSP:BKL:dcr
DJ 169-11-0

Mrs. Sonja Berg
1139 Willow Street, Apt. 2
Pinole, California 94564

Re: EEOC Charge Against Richmond Unified School District, No. TSF 3 0929

Dear Mrs. Berg:

Because you have filed a charge against the respondent named above with the Equal Employment Opportunity Commission, and the Commission has determined that it will not be able to investigate and conciliate that charge within 180 days of the date the Commission assumed jurisdiction over the charge and this Department has determined that it will not file any lawsuit based upon that charge within that time and because you have specifically requested this Notice, you are hereby notified that you have the right to institute a civil action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq., against the above named respondent.

The civil action must be filed in the appropriate United States District Court within 90 days of your receipt of this Notice.

If you are unable to retain an attorney, the Court is authorized in its discretion to appoint an attorney to represent you and to authorize commencement of

the suit without payment of fees, costs, or security. In order to apply for an appointed attorney, you may take this Notice, along with any correspondence you have received from the Justice Department or the Equal Employment Opportunity Commission, to the Clerk of the United States District Court for the Northern District of California located in San Francisco.

Your attorney may inspect the investigative file pertaining to your case at a time and place convenient to the parties. That file is located in the EEOC District Office, at 1905 Market Street, San Francisco, California.

We request that you send this Department a copy of any complaint initiating suit.

Sincerely,
J. Stanley Pottinger
Assistant Attorney General
Civil Rights Division

By:
Brian K. Landsberg
Chief
Education Section

cc: EEOC District Office
San Francisco, California
Mary C. Dunlap, Esquire
Napa, California

[U.S. District Court title omitted in Printing]

AMENDMENT TO COMPLAINT

After XI. at line 16 of page 5 of plaintiff's Complaint in the above-entitled action, the said Complaint is amended to include the following:

"Plaintiff's claim under 42 U.S.C. 2000e et seq. filed as TSF3-0929 with the Equal Employment Opportunity Commission was first deferred to and was returned from the California Fair Employment Practice Commission, before formal filing of said claim by the federal Commission. A letter declaring such referral back is filed with Plaintiff's Memorandum of Points and Authorities in Opposition to Motion to Dismiss Civil Action, in C-73-0192-AJZ, marked "Exhibit A", and is incorporated herein by this reference."

Mary C. Dunlap

[U.S. District Court title omitted in Printing]

NOTICE OF MOTION AND MOTION TO FILE SUPPLEMENT TO COMPLAINT

To: Richmond Unified School District, Richmond Board of Education, W. W. Snodgrass, and their attorneys:

Please take notice that on ....., 1973, in the Courtroom of the Honorable Alfonso J. Zirpoli, at the United States Courthouse, 450 Golden Gate Avenue, San Francisco, California, at ..... .m. or as soon thereafter as counsel may be heard, plaintiff Sonja Lynn Berg will and does hereby move the afore-captioned Court as follows:

Said plaintiff moves this Court under Rule 15(d) of the Federal Rules of Civil Procedure and under Rule 118(b) of the Local Rules of Practice for the United States District Court for the Northern District of California for leave to file a supplement to plaintiff's complaint in the above-entitled action, which supplement shall set forth the issuance of notice to plaintiff of her right of action under 42 U.S.C. section 2000e et seq. on February 21, 1973, and for leave under Local Rule 118 (b) to file said supplement without filing of an entire supplemental complaint by plaintiff.

Plaintiff's said motion will be based upon this notice of motion, the supplement to complaint, memorandum of points and authorities in support of motion for supplement, and the proposed order filed herewith and all other pleadings, papers and records on file in the above-entitled action.

Mary C. Dunlap

Dated: April 22, 1973

[U.S. District Court title omitted in Printing]

SUPPLEMENT TO COMPLAINT

After line 11 of page 6 of plaintiff's complaint in the above-entitled action, the said complaint is supplemented to include the following:

> "On February 21, 1973, the right of plaintiff to maintain this action under 42 U.S.C. 2000e et seq. was noticed by letter from the United States Department of Justice. Said letter is attached to Plaintiff's Supplemental Memorandum Re Jurisdiction marked "Exhibit A", and is incorporated herein by this reference."

[U.S. District Court title omitted in Printing]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO FILE SUPPLEMENT TO COMPLAINT

I. Rule 15(d) of the Federal Rules of Civil Procedure Expressly Provides for Supplementation of the Sort Moved for by Plaintiff Herein.

> "Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented."
>
> —Rule 15, Federal Rules of Civil Procedure.

Plaintiff filed the above-entitled action on February 5, 1973. Issuance of a letter embodying notice of plaintiff's right of action under 42 U.S.C. section 2000e et seq. was made by the United States Department of Justice on February 21, 1973. The issuance of that notice is therefore obviously a transaction, occurrence or event transpiring after filing of plaintiff's complaint, as classified in Rule 15(d) above-quoted. Thus under that Rule this Court holds discretion to permit or refuse filing of a supplement to plaintiff's complaint, which supplement would present the aforesaid post-filing transaction, occurrence or event. See Supplement to Complaint, filed herewith.

II. This Court Should Permit Plaintiff to File Said Supplement to Her Complaint in This Case.

Plaintiff took all steps necessary to prompt issuance of notice of her right of action against defendants herein under 42 U.S.C. 2000 e et seq.; unlike parties in other Title VII actions who forewent the step of applying for such notice from the relevant federal agencies, plaintiff took that step on January 12, 1973. *See* extensive discussion of this matter at pages 3-6 of Plaintiff's Memorandum of Points and Authorities in Opposition to Motions to Dismiss Civil Action; *see also* Exhibit "C" thereto appended. It would be contrary to the remedial purposes of Title VII of the Civil Rights Act of 1964 to deny plaintiff this opportunity to "perfect" this Court's jurisdiction over the claims of plaintiff based upon that Act by filing of the aforesaid supplement to her complaint. Henderson v. Eastern Freight Ways, Inc., 460 F.2d 258, 260 (4th Cir. 1972); Stebbins v. Continental Ins. Co., 442 F.2d 843, 845-846 (D.C.Cir. 1971).

III. Rule 118(b) of the Local Rules of Practice for This District Permits This Court to Allow Plaintiff to File and Serve the Said Supplement to Her Complaint Without Filing the Supplemental Complaint in Its Entirety.

This Court is empowered to permit plaintiff to supplement her complaint without requiring plaintiff to file an entire supplemental complaint. Rule 118(b) of the Local Rules of Practice for this District appear to so provide. Plaintiff respectfully requests that, in consideration of the length of plaintiff's complaint with exhibits appended and of the inconvenience and expense of filing a supplemented complaint in its entirety, this Court permit supplementation of the complaint in the instant case by filing of the supplement to the complaint and stamping of the original complaint "supplemented".

Mary C. Dunlap

Dated: April 22, 1973

[U.S. District Court title omitted in Printing]

ANSWER AND DEMAND FOR TRIAL BY JURY

Come now the Richmond Unified School District, a political subdivision and agency of the State of California; the Governing Board of the Richmond Unified School District, sued herein as the Richmond Board of Education; and W. W. Snodgrass in his official capacity as Superintendent of Schools of the

Richmond Unified School District; each for himself or itself and not one for the other, and answer the complaint on file in the above-entitled action, as follows:

I

Answering Paragraph I, deny the allegations contained therein.

II

Answering Paragraph II, admit the allegations contained therein.

III

Answering Paragraph III, deny the allegations contained therein.

IV

Answering Paragraph IV, admit the allegations contained therein, excepting that the District operates schools *in* and not *of* the City of Richmond.

V

Answering Paragraph V, admit the allegations contained therein, excepting that the name of the defendant sued as the Richmond Board of Education is Governing Board of the Richmond Unified School District.

VI

Answering Paragraph VI, deny the allegations contained therein.

VII

Answering Paragraph VII, admit that Exhibit A to the complaint sets forth Section 131.10 of the regula-

tions of the Richmond Unified School District, lawfully adopted by the Governing Board thereof, and except as so admitted, deny the allegations contained therein.

VIII

Answering Paragraph VIII, admit the allegations contained therein.

IX

Answering Paragraph IX, admit the allegations contained therein.

X

Answering Paragraph X, admit the allegations contained therein.

XI

Answering Paragraph XI, admit the allegations contained therein.

XII

Answering Paragraph XII, admit that on December 27, 1973, Sam Teese as Assistant Superintendent of Personnel of the Richmond Unified School District, sent a letter to Mrs. Sonja Berg, a copy of which is attached to the complaint as Exhibit G, and that on or about January 10, 1973, Sam Teese received an undated letter from Mary C. Dunlap, purportedly an attorney for Sonja Berg, a copy of which is attached to the complaint as Exhibit H, and except as so admitted deny the allegations contained therein; as to the allegations respecting Mrs. Dunlap's capacity as attorney for Sonja Berg, said denial is based upon lack of information or belief.

XIII

Answering Paragraph XIII, deny the allegations contained therein.

XIV

Answering Paragraph XIV, admit that the District directed plaintiff to see a district physician, as set forth in Exhibit G, and except as so admitted, deny the allegations contained therein.

XV

Answering Paragraph XV, deny the allegations contained therein.

XVI

Answering Paragraph XVI, deny the allegations contained therein.

XVII

Answering Paragraph XVII, deny the allegations contained therein.

Wherefore, Defendants pray:

1. That the above-entitled action be dismissed.

2. That plaintiff take nothing by the above-entitled action.

3. That the defendants have judgment for their costs of suit.

4. For such other relief as the Court may deem just and proper.

John B. Clausen
County Counsel

(Jury Demand omitted)

[U.S. District Court title omitted in Printing]

OPPOSITION TO MOTION TO FILE SUPPLEMENT TO COMPLAINT

Come now defendants Richmond Unified School District, the Governing Board of the Richmond Unified School District (sued herein as the Richmond Board of Education), and W. W. Snodgrass as Superintendent of Schools of the Richmond Unified School District, and oppose the pending motion of plaintiff for leave to file a supplement to her complaint, and pray that said motion be denied.

I

The Purpose of a Supplemental Complaint Is Not to Correct Deficiencies of the Original Complaint, But to Bring a Controversy Up to Date and to Introduce Newly-Occurring Facts Which Enlarge or Change the Relief Sought.

The purpose of a supplemental complaint is to bring a dispute up to date (*City of Texarkansas v. Arkansas Louisiana Gas Co.,* 306 U.S. 188, 59 S.Ct. 448, 83 L.Ed. 598 [1939]) and to introduce new facts which enlarge or modify the relief sought in the original complaint (*Southern Pac. R.R. v. Conway,* 115 F.2d 746 [9th Cir. 1940]; *Brotherhood of Locomotive Firemen & Enginemen v. Butte, Anaconda & Pac. Ry.,* 286 F.2d 706 [9th Cir. 1961], cert. den. 366 U.S. 929, 81 S.Ct. 1650, 6 L.Ed.2d 388 [1961]).

However, that is not the purpose of plaintiff's proposed "Supplement To Complaint." The proposed

Supplement purports to state an event which admittedly took place on 21 February 1973 (after the filing of the original complaint on 5 February 1973), but the event of transaction alleged is one which is a precondition to the original filing. The proposed supplement does nothing to bring the controversy up to date or to enlarge the relief sought.

Obviously, plaintiff hopes improperly to use this Supplement to correct the deficiencies in her complaint as to the alleged violation by defendants of Title VII of the Civil Rights Act of 1964 (42 U.S.C.A. §2000e et seq.).

II

The Proposed Supplement to Complaint Fails to Cure the Defects of the Original Complaint and Adds Nothing to Plaintiff's Alleged Claim.

It is defendants' contention that plaintiff has failed to state a claim upon which relief can be claimed under the Civil Rights Act and that the proposed Supplement does not cure the defects. Defendants have previously filed substantial arguments and authorities on this point as to the original complaint (Points and Authorities In Support of Motion to Dismiss, pp. 1-3, filed on 22 March 1973); the same arguments and authorities are applicable to the proposed Supplement, for as of the date the complaint was filed the jurisdictional prerequisites had not been met. That is to say, there is no allegation, either in the complaint or in the proposed Supplement, that the claim

plaintiff had presented to the EEOC is the same as the present action.

For the reasons stated, defendants respectfully ask that the Court deny plaintiff's motion for leave to file the proposed Supplement to Complaint.

John B. Clausen
County Counsel

[U.S. District Court title omitted in Printing]

NOTICE OF MOTIONS AND MOTIONS TO DISMISS

To: Sonja Lynn Berg and to Mary C. Dunlap, her attorney:

Please Take Notice that on Monday, 18 June 1973, in the courtroom of the Honorable Alfonso J. Zirpoli at the United States Courthouse, 450 Golden Gate Avenue, San Francisco, California, at 1:30 p.m. or as soon thereafter as counsel may be heard, defendants Richmond Unified School District, the Governing Board of the Richmond Unified School District sued herein as the Richmond Board of Education, and W. W. Snodgrass as Superintendent of Schools of the Richmond Unified School District, will and do hereby move this Court as follows:

I

Said defendants move to dismiss the action on the ground that the court lacks jurisdiction of the subject matter, insofar as the action is predicated upon 42 U.S.C. §2000e et seq., on the ground that plaintiff has

failed to obtain a notice of right to sue prior to filing suit, as required by 42 U.S.C. §2000e-5(f).

II

Said defendants move to dismiss the action on the ground that the complaint, as amended and supplemented, fails to state a claim upon which relief can be granted, in that insofar as the action is predicated upon 42 U.S.C. §2000e et seq., the complaint, as amended and supplemented, fails to allege that plaintiff has first commenced proceedings under the California Fair Employment Practice Act (Cal. Labor Code §1410 et seq.) or the Equal Employment Opportunities Act, regarding the subject matter of the present suit, or that the Attorney General has first given notice allowing a civil action regarding the subject matter of the present suit, as required by 42 U.S.C. §2000e-5(f).

Said motions are made under Rule 12 of the Federal Rules of Civil Procedure and are based upon this notice of motions, the proposed order attached hereto, the points and authorities filed herewith, and all the pleadings, records and papers on file in said action or submitted in support hereof.

John B. Clausen
County Counsel

Lodged 6/25/73

In the United States District Court
Northern District of California

No. C-73-0192-AJZ

Sonja Lynn Berg, etc.,
Plaintiff,

vs.

Richmond Unified School District,
et al.,
Defendants.

ORDER ON MOTION TO SUPPLEMENT COMPLAINT

The motion of plaintiff for an order under Rule 15(d) of the Federal Rules of Civil Procedure and under Rule 118(b) of the Local Rules of Practice for the Northern District, giving leave to plaintiff to file and serve supplementation to her Complaint and to file and serve said supplement only, having been duly heard, and the Court being fully advised,

IT IS ORDERED that plaintiff's motion for leave to supplement her Complaint, by filing and service of said supplement only, be and the same is hereby granted.

Dated: June 6, 1973

Alfonso J. Zirpoli
United States District Judge

[U.S. District Court title omitted in Printing]

SUPPLEMENT TO COMPLAINT

After line eleven (11) of page six (6) of plaintiff's Complaint in the above-entitled action, the said Complaint is supplemented to include the following:

> "On February 21, 1973, the right of plaintiff to maintain this action under 42 U.S.C. 2000e et seq. was noticed by letter from the United States Department of Justice. A copy of said letter is hereto attached, marked "Exhibit AA", and is incorporated herein by reference."

"Exhibit AA"

Feb. 21 1973

JSP:BKL:dcr
DJ 169-11-0

Mrs. Sonja Berg
1139 Wllow Street, Apt. 2
Pinole, California 94564

Re: EEOC Charge Against Richmond Unified School District, No. TSF 3 0929

Dear Mrs. Berg:

Because you have filed a charge against the respondent named above with the Equal Employment Opportunity Commission, and the Commission has determined that it will be able to investigate and conciliate that charge within 180 days of the date the Commission assumed jurisdiction over the charge, and this Department has determined that it will not file any lawsuit based upon that charge within that time and because you have specifically requested this Notice, you are hereby notified that you have the right to institute a civil action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq., against the above named respondent.

The civil action must be filed in the appropriate United States District Court within 90 days of your receipt of this Notice.

If you are unable to retain an attorney, the Court is authorized in its discretion to appoint an attorney to represent you and to authorize commencement of the suit without payment of fees, costs, or security.

In order to apply for an appointed attorney, you may take this Notice, along with any correspondence you have received from the Justice Department or the Equal Employment Opportunity Commission, to the Clerk of the United States District Court for the Northern District of California located in San Francisco.

Your attorney may inspect the investigative file pertaining to your case at a time and place convenient to the parties. That file is located in the EEOC District Office, at 1905 Market Street, San Francisco.

We request that you send this Department a copy of any complaint initiating suit.

Sincerely,
J. STANLEY POTTINGER
Assistant Attorney General
Civil Rights Division

By: BRIAN K. LANDSBERG
Chief
Education Section

cc: EEOC District Office
San Francisco, California

Mary C. Dunlap, Esquire
Napa, California

[U.S. District Court title omitted in Printing]

STATEMENT IN OPPOSITION TO MOTIONS TO DISMISS CIVIL ACTION

Plaintiff Sonja Lynn Berg will and does hereby oppose the motions of defendants Richmond Unified School District, et al. to dismiss the above-entitled action, as follows:

I. Plaintiff opposes the motion of defendants to dismiss the action on the alleged ground of lack of jurisdiction due to past-filing issuance of the letter-to-sue, on the grounds that this Court has already determined this issue against defendants and on the further ground that the letter-to-sue issued to plaintiff on February 21, 1973 was timely and properly issued by the United States Department of Justice.

II. Plaintiff opposes the motion of defendants to dismiss the action on the alleged ground of plaintiff's purported failure to exhaust prescribed state and federal administrative remedies under 42 U.S.C. Code 2000e et seq. on the ground that said allegation is factually insupportable, and on the further ground that defendants have already received adverse ruling on certain parts of said objection, and on the final ground that alleged failures of administrative agencies to fulfill their maximum responsibilities under Title VII cannot impair plaintiff's right of action, nor this Court's power to hear said action, under 42 U.S. Code section 2000e et seq.

Said opposition of plaintiff is made pursuant to sections (c) and (d) of Rule 114 of the Local Rules

of Practice in and for the United States District Court for the Northern District of California. Said opposition by plaintiff is and will be based upon this statement of opposition, the proposed order attached hereto, the memorandum of points and authorities herewith filed, and the pleadings, records, and papers on file in the above-entitled action.

Mary Cynthia Dunlap,
Attorney for Plaintiff

[U.S. District Court title omitted in Printing]

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

To Richmond Unified School District, Richmond Board of Education, W.W. Snodgrass, Superintendent of Education in his official capacity, and to their attorneys of record, Messieurs Arthur Walenta and Silvano Marchesi, Deputies County Counsel for Contra Costa County:

Please Take Notice that plaintiff will bring on for hearing, in the Courtroom of the Honorable Alfonso J. Zirpoli, United States Courthouse, 450 Golden Gate Avenue, San Francisco, California on the 13th day of August, 1973, at 1:30 p.m. o'clock, or as soon thereafter as counsel can be heard, the following motion for summary judgment:

Plaintiff moves this Court as follows:

That this Court enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judg-

ment, on behalf of plaintiff and all other persons similarly situated, for the relief demanded in plaintiffs' complaint on the ground that there is no genuine issue as to any material fact and that plaintiff and all other persons similarly situated are entitled to a judgment in their favor as a matter of law.

This motion is based upon the Memoranum of Points and Authorities in Support of Summary Judgment, hereto appended, the Motion for and Memorandum in Support of Preliminary Injunction, the Order and Opinion Upon Preliminary Injunction, and the Complaint and Answer, in *Berg v. Richmond Unified School District, et al.*, C-73-0192-AJZ.

Mary C. Dunlap

Dated: 4 July 1973

[U.S. District Court title omitted in Printing]

STATEMENT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Pursuant to the requirements of Rule 118 of the *Local Rules of Practice* of the United States District Court of California, counsel for plaintiff submits the within statement as to the genuineness of issues of material fact in the instant controversy.

There are no material facts in the instant controversy as to which there is a genuine dispute. By their Answer defendants have admitted:

(1.) that plaintiff Sonja Lynn Berg was a schoolteacher employed by the defendant District at all

times relevant to the Complaint of plaintiff (see Answer of Defendant's, p.1 at lines 29-30);

(2.) except for a prepositional "correction", that defendant District is responsible for the operation of the public school system in Richmond, County of Contra Costa, California (see Answer, p.2 at lines 6-8);

(3.) that the "Governing Board of the Richmond Unified School District", sued by plaintiff under the title "Richmond Board of Education", is the body vested with responsibility for primary and secondary education of defendant District (see Answer, p.2 at 11-14);

(4.) that Section 131.10 of the regulation of defendant District, which compels female employees to take leave upon the commencement of the seventh month of pregnancy, was adopted by defendant Board (see Answer, p.2 at lines 21-25);

(5.) that defendants have denied and continue to deny accrued sick pay to pregnant female employees including plaintiff, and that said denial is accomplished by unwritten policy of defendants (see Answer, p.2 at lines 28-29);

(6.) that defendants' "interim" maternity leave policy was adopted on December 13, 1972, which policy permits any exceptions by approval of defendants to the seventh-month leave compulsion (see Answer, p.2 at lines 32-);

(7.) that defendants or their agents have attempted to apply a maternity leave policy, which differs from

a policy that permits the individual employee and her physician to decide when leave should commence, to plaintiff herein (see Answer, at p.3, lines 2-3, 6-7, and 10-13); and

(8.) that defendants directed plaintiff to see a physician selected by defendant District in relation to her maternity leave request (see Answer, p.3 at lines 27-28).

By their Answer to plaintiff's Complaint defendants in the instant action have admitted every fact that is material to the establishment of plaintiff's claims under 42 U.S. Code section 2000e et sq. and under 42 U.S. Code section 1983. Defendants' denials in their Answer go to the *legal* allegations of the aforesaid Complaint, *to wit.*, that the defendants' discriminatory maternity leave and sick pay policies violate the rights of plaintiff and her purported class under the above-cited statutes (see Answer, at P.1 lines 26; p.2 lines 2-3, 17-18, 24-25; p.3, lines 23-24 and 32; p.4, lines 2-3, 6-7).

Therefore, the real issues of this case are susceptible to determination by this Court as matters of law. As more extensively presented in Plaintiff's Memorandum of Points and Authorities in Support of Motion for Summary Judgment, herewith submitted, those questions of law should be resolved in plaintiff's favor in the instant action.

Mary C. Dunlap

Exhibit "A"

[U.S. District Court title omitted in Printing]

AFFIDAVIT OF SONJA LYNN BERG IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Mrs. Sonja Lynn Berg, being duly sworn, deposes and says:

I am a schoolteacher employed in the Richmond Unified School District. On December 1, 1972 I informed my employer that I wished to take maternity leave commencing on March 23, 1973. At that time, my employer informed me that I would have to return to work on or before May 1, 1973 if I wished to be permitted to continue teaching during this school term.

On the evening of March 14, 1973, after a regular day's work of teaching, I gave birth to my first child. My recuperation has been normal, so far as I know.

On May 1, 1973, *I was not yet ready* to return to teaching, so I did not return to teaching during the aforesaid school term. I plan to return to teaching on the first regular work day of the fall semester of 1973.

Mrs. Sonja Lynn Berg

Dated: 7-12-73

(jurat omitted)

Exhibit "B"

[U.S. District Court title omitted in Printing]

AFFIDAVIT OF DR. ROBERT TOMFOHRDE, IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

DR. ROBERT TOMFOHRDE, being duly sworn, deposes and says:

I am a medical doctor.

On March 14, 1973, my patient, Sonja Lynn Berg, gave birth to a male infant, who weighed six pounds and five ounces at birth. Both Mrs. Berg and her baby son were in good health, at the date of their last examination on June 15, 1973, Mrs. Berg and March 23, 1973, baby.

Dr. Robert Tomfohrde, M.D.

(jurat omitted)

ORDER DENYING MOTION TO DISMISS
(Petition for Writ of Certiorari, Appendix C, pg. 35)

[U.S. District Court title omitted in Printing]

STATEMENT ON ISSUES OF MATERIAL FACTS; CROSS-MOTION FOR SUMMARY JUDGMENT; AFFIDAVIT OF FLOYD LARSON; AFFIDAVIT OF SILVANO MARCHESI; POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Statement on Issues of Material Facts

Pursuant to Rule 118(a) of this Court's Local Rules of Practice, defendants submit the following statement as to the issues of material facts in the present case.

The following facts material to the disposition of plaintiff's motion for summary judgment remain in issue:

(1) Whether defendants have at all pertinent times enforced Section 131.10 of the district's rules and regulations. (Complaint, Paragraph VII; Affidavit of San Teese In Opposition To Motion for Preliminary Injunction, filed 20 February 1973, #3; Answer, Paragraph VII)

(2) Whether "pregnancy is the sole disability for which the district requires an employee to take a leave of absence even when the employee and attending physician do not deem it necessary." (Affidavit of Sam Teese In Opposition To Motion For Preliminary Injunction, filed 20 February 1973, #5; Order Granting Motion For Preliminary Injunction, entered 22 February 1973, p.4, ll. 18-21)

(3) Whether "only a person who is pregnant is forced to submit to an examination by the school district's doctor in order to continue working." (Complaint, Paragraphs XIII and XIV; Affidavit of Sam Teese In Opposition To Motion For Preliminary Injunction, filed 20 February 1973, #5; Order Granting Motion For Preliminary Injunction, entered 22 February 1973, p. 4, ll. 21-23)

(4) Whether plaintiff has suffered any damages because of defendants' policies and practices. (Complaint, Paragraph XVII; Answer, Paragraph XVII)

Defendants submit that the above factual issues are material to the disposition of plaintiffs' motion for summary judgment and of the case in general, for if they are resolved in favor of the defendants, plaintiff has completely failed to prove discrimination against her based on her sex. As such, the above factual issues preclude the disposition of plaintiff's motion solely on basis of legal arguments.

Cross-Motion For Summary Judgment

Even if the Court were to find there were no material facts in issue in this case, defendants contend that plaintiff is not entitled to a summary judgment as a matter of law, as set forth in the Opposition below. On the contrary, assuming such a finding by the Court, defendants will move the Court for a summary judgment in favor of defendants herein dismissing the action. Said *motion will be based on* this Opposition to plaintiffs' motion, on the Affidavit of Floyd Larson, and *on all the pleadings and proceedings heretofore had herein.*

[U.S. District Court title omitted in Printing]

AFFIDAVIT OF FLOYD LARSON IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Floyd Larson, being duly sworn, deposes and says:

1. I am the Assistant Director of Personnel for the Richmond Unified School District.

2. To my knowledge, Sonja Berg has not requested to return to her duties as a certificated employee of said district since the birth of her child on or about 14 March 1973.

3. To my knowledge, Mrs. Berg has not indicated to district personnel that she intends to return to her duties as of the beginning of the 1973-1974 school year.

4. To my knowledge, since 3 February 1973 I have not told Sonja Berg that if she did not return to her duties by 1 May 1973 she could not return before the ensuing 1973-1974 school year.

5. I am not aware of any district rule, regulation, policy, or practice prohibiting a return to duties between 1 May and the end of the school year.

Floyd Larson

(jurat omitted)

[U.S. District Court title omitted in Printing]

AFFIDAVIT OF SILVANO MARCHESI IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Silvano Marchesi, being duly sworn, deposes and says:

1. I am an attorney at law, licensed to practice in all the state courts of the State of California and admitted to practice before this Court.

2. I am one of the attorneys representing the defendants herein.

3. On 18 June 1973 I visited the Regional Office of the Equal Employment Opportunities Commission at 1095 Market Street, San Francisco, California.

4. Upon my request, I was allowed to inspect the file relating to Charge No. TSF 3 9029. Said file contained the Charge, with copies of the Richmond Unified School District's Rules Nos. 131.06, 131.07, 131.10, and 131.11 attached; a Notice of Charge of Employment Discrimination and various letters and memoranda pertaining to said Charge.

5. Upon my further request, I was furnished copies of a portion of said file.

6. Attached hereto as Exhibit A is an accurate and true copy of Charge No. TSF 3 9029, furnished to me by the Regional Office of the EEOC on said date.

Silvano Marchesi

(jurat omitted)

CHARGE OF DISCRIMINATION

(If you have a complaint, fill in this form and mail it to the Equal Employment Opportunity Commission's Regional Office in your area. In most cases a charge must be filed with the EEOC within a specified time after the discriminatory act took place. IT IS THEREFORE IMPORTANT TO FILE YOUR CHARGE AS SOON AS POSSIBLE.

This form is to be used by to file a charge of discrimination based on RACE, COLOR, RELIGION, SEX, or NATIONAL ORIGIN.

10:5 A.M. SAN FRANCISCO, CALIF.

NOV 17 1972

Case File No. 15F 3-0929

(PLEASE PRINT OR TYPE)

AM 7 8 9 10 11 12 1 2 3 4 5 6 PM

1 Your Name (Mr., Mrs., Miss) Mrs. Sonja Berg Phone Number 758-4927

Street Address 1139 Willow Street, Apt. 2

City Pinole State California Zip Code 94564

2 WAS THE DISCRIMINATION BECAUSE OF: (Please check one)

Race or Color ☐ Religious Creed ☐ National Origin ☐ Sex ☒

3 Who discriminated against you? Give the name and address of the employer, labor organization, employment agency and/or apprenticeship committee. If more than one, list all.

Name Richmond Unified School District

Street address 1108 Bissell Avenue

City Richmond State California Zip Code

AND (other parties if any)

W. W. Snodgrass-Superintendent
1108 Bissell
Richmond phone 234-3825

Mr. Sam Teese-Asst. Supt. Personnel
1108 Bissell
Richmond phone 234-3825

4 Have you filed this charge with a state or local government agency? Yes ☐ When ____ (MONTH) ____ (DAY) ____ (YEAR) No ☒

5 If your charge is against a company or a union, how many employees or members? Under 25 ☐ Over 25 ☐

6 The most recent date on which this discrimination took place: Month ____ Day ____ Year ____

7 Explain what unfair thing was done to you. How were other persons treated differently? (Use extra sheet if necessary.)

I am a kindergarten teacher in the Richmond Unified School District. My husband is presently a full-time student. I am pregnant and was planning to work until my delivery date or as long as possible. My doctor and I feel that there is no medical or personal reason why I should not be able to. But according to school district regulations, I must request a "maternity leave" commencing no later than the start of the seventh month of pregnancy which is only 5 weeks away. In addition, I have 27 days sick leave which I will not be paid for under regular sick days or emergency leave policy. Up to this point, I have had no written correspondence with the district concerning this matter. Together with my husband, I am frantic over our impending financial crisis which is the result of the discriminatory practices of the school district. (See Title 29, Labor, Chapter XIV, Part 1604, Sec. 1604.10)

8 I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

Date 11/15/72 Sonja Berg (Sign your name)

Subscribed and sworn to before me this ____ day of ____ 196 ____

(Name) (Title)

If you want for you to get a Notary Public to sign this, sign your own name and mail to the Regional Office. The Commission will help you get sworn to.

FORM DIR. OF BUDGET—No. 124–R0001

EXHIBIT A

BEST COPY AVAILABLE

EEOC-5 (REV. 7-68)

Exhibit "A"

RICHMOND UNIFIED SCHOOL DISTRICT
REQUEST FOR MATERNITY LEAVE

By Board of Education adoption, the following regulations shall apply to certificated maternity cases:

1. In case of expected maternity, a leave must be requested.
2. The leave must commence no later than the start of the seventh month of pregnancy.
3. The request for leave must include a doctor's statement regarding the expected date of confinement.
4. The request must include a projected date for termination of the leave.

Personnel
1-4-72

. . .

Section 131.07 Health and Injury

1. Health Leave
   - 1.1 Any certificated employee classified as a permanent employee may be granted an extended leave of absence with or without use of pay at discretion of employee for purposes of health, rest and recuperation. Extended leave may be granted for a six months or one-year period to correspond as nearly as possible with the schedule of the school year.
   - 1.2 Upon request of the Superintendent, the employee shall provide a health affidavit

from a licensed physician to verify the need for the requested health leave.

1.3 Prior to the granting of a health leave, the Governing Board may require a physical examination to be performed by a physician selected by the Governing Board. Such examination shall be at no cost to the employee.

2. No salary or sick leave deduction is made for absence due to contagious disease, which may be presumed to have been contacted during the performance of school duties with other persons having a contagious disease, for the period of isolation or quarantine.

3. Full time certificated personnel shall be allowed absence from duty because of personal illness or injury for ten (10) full days each school year without loss of salary. Unused days of such leave shall be accumulative with a maximum of ten (10) days per year allowable. (Educational Code Sec. 13468).

4. Personal illness of more than five (5) school days duration shall be verified by a certificate from a licensed physician. Such certificate shall be given to the Principal who shall in turn forward said certificate to the School Health Department.

5. Beyond the number of days of absence allowed for personal illness or injury with full salary, full time certificated employees shall be allowed their regular salary, less the cost of a substitute, for a period of five (5) school months, exclusive of those days in which full salary was allowed. (Education Code, Section 13456). If the difference is less than $3.00 per day, a

minimum of $3.00 per day shall be paid the absent employee. The Governing Board will not allow any difference in salary of substitute, and salary of regular employee beyond the five school month period.

. . .

Section 131.10 Maternity and Paternity Leaves

1. In all cases of expected maternity of a permanent certificated employee, the employee must secure an extended leave of absence. This leave must become effective no later than the start of the seventh month of pregnancy.

2. Maternity leave may be terminated by the individual teacher by presenting a statement from a physician that the individual is physically and mentally able to resume teaching. The certificated employee shall give a minimum of 30 days notice of intent to return.

3. In case of adoption of an infant, the mother will be allowed maternity leave if she requests such leave.

4. Paternity leave of one (1) day may be granted the male employee without loss of pay during or immediately after the confinement of his wife. In cases of adoption of an infant, the same regulations will apply as in the case of a natural birth.

. . .

REPORTER'S TRANSCRIPT:

Hearing on Motion for Summary Judgment:

[40] *MONDAY, AUGUST 20, 1973*

THE CLERK: Civil Case 73-0192, Berg, et al., versus Richmond Unified School District, et al., motion for summary judgment and motion to certify class.

Counsel please state their appearance for the record.

MS. DUNLAP: Mary Dunlap for the plaintiff and moving party.

MR. MARCHESI: Silvano Marchesi, Deputy County Counsel for the respondents.

THE COURT: Are you prepared to submit the motion? You have motion for summary judgment and motion to certify class.

MS. DUNLAP: I would have but two rather brief points to make, one on each of those two motions, Your Honor, as soon as I find the paper.

On the issue of the size of this class, there is some slight factual discrepancy as between the affidavit on plaintiff's behalf and the facts as to the size of the class alleged by the counsel for the defendant.

THE COURT: Well, the question is, if there is a class action, who shall be included in the class?

MS. DUNLAP: I believe that's so, Your Honor.

THE COURT: Well, if I were to find a class action, I would apply it prospectively only, I can tell you that now.

[41] MS. DUNLAP: I take it from that observation your reading of Mather is that the line——

THE COURT: My reading of it is that . . . I don't know how many there are, but there doesn't

appear to be more than possibly a dozen involved. The class is not that numerous, and it's not so sure, as far as your client is concerned, in view of the rulings I may make, that your client is necessarily representative of that class. For all those reasons, if I were to find a class action, I would narrow it in the manner in which I have indicated. And that would be a relatively simple thing to do. There are no damages involved, it's a question of prospective application. So that that type of narrowing of the class may be appropriate, to include those who are not that numerous and in my view may not be an appropriate disposition of the request for class action under the rule.

What was the next thing you wanted to comment on?

MS. DUNLAP: Well, my other comment has to do with the motion for summary judgment. If I understand Your Honor on the issue of the class, I would think that the main question remaining would be whether the prospectively identified class were, in the instance that our motion for summary judgment is granted—whether the remedy to that class were under Title 7 a declaratory judgment or injunctive relief. And I would point out in that regard that the complaint asks for an [42] injunction, but that if it is Your Honor's view that the sick pay accrual policy is in violation of Title 7, perhaps declaratory relief declaring that unwritten policy, as defendants have admitted it to be, to be invalid under Title 7, would be the most appropriate form of relief, as opposed to an injunction which would necessarily have to be

mandatory in form, compelling the defendants to pay accrued sick leave to the prospectively identified class. So that in that respect I would ask that, to the extent necessary to be procedurally sound, the complaint be amended to include whatever is necessary for a showing for declaratory relief. My understanding is simply that the meaning of Title 7 through Section 2008(5), I believe it is, that identifies the forms of remedy available to the Court in a Title 7 action, would cover that instance; but if there's a procedural defect in that respect, I would ask that we have leave to do that, to suit this motion and this class itself to the remedy.

THE COURT: Well, you are trying to bring the class under 1983, aren't you?

MS. DUNLAP: The prospectively identifiable class I think is defined through Title 7.

THE COURT: You want to make some comment on that? What about the summary judgment as to the individual claim?

MR. MARCHESI: Are you referring the question to me, Your Honor?

[43] THE COURT: Yes. Shouldn't I enter it?

MR. MARCHESI: I don't think Your Honor should enter it. I don't think that it qualifies as .... Now you are getting to the merits of the summary judgment on the 1983 claim, is that correct?

THE COURT: Well, a Title 7 claim for summary judgment.

MR. MARCHESI: Well, as I understand it, the summary judgment would apply to both grounds for

the action, both bases for the action, a claim for summary judgment under both 1983 and Title 7.

MS. DUNLAP: I have attempted insofar as it was possible, Your Honor, to make it clear that I view Your Honor's prerogative under Title 7 as being actually sufficient to afford the plaintiff relief here, so that summary judgment on 1983 grounds would simply be unnecessary as a legal matter, for the reason that Title 7 itself is fully descriptive of the rights and remedies of the parties here, insofar as the individual relief to the plaintiff is concerned.

MR. MARCHESI: If the case is to be presented, or if this motion is to be presented as a Title 7 motion for summary judgment, then the respondents would oppose it for all the reasons set forth in the——

MS. DUNLAP: It was clearly noticed as a motion for Title 7 relief, Your Honor, and has been docketed through the [44] memorandum of points and authorities on that issue. So if counsel for defendant wish to answer it, he had the opportunity to do so. It was made clear that Title 7 was being relied on for purposes of summary judgment.

MR. MARCHESI: Opposition to that motion on that basis was submitted.

MS. DUNLAP: So your opposition has been made?

MR. MARCHESI: That's correct.

MS. DUNLAP: I was confused as to what you were saying.

On the summary judgment, Your Honor, I would emphasize defendant has set forth for supposed issues

of material fact in reply to this motion, no one of which is an issue of material fact. Now, if Your Honor would like me to describe why, I would be willing to do that. But each of these things has come up before.

The first position is essentially on the issues of fact, whether they really have this policy that we have been litigating all this time. It is fairly irrelevant to the Court's conclusion whether it's Section 131.90 or an interim policy with interim exceptions being enforced, insofar as the plaintiff's challenge to the principle and the defendant's drawing of a compulsory line, with whatever exceptions, District positions or otherwise is concerned. So there's not an issue of material fact.

[45] Then there is the business of whether the section has been regularly enforced. Well, that's irrelevant, and the section has been enforced insofar as this individual plaintiff is concerned frequently enough to infringe upon the rights of plaintiff and others similarly situated under Title 7. So there's not an issue of fact either.

Then there is a question raised in the third point of defendant's list of purported issues of fact as to whether any group other than pregnant females must show doctors they can go on working or must be susceptible to certain kinds of leave. No such group is defined by any regulation or any policy or any practice of defendants. They have not said all people having heart attacks or tonsillitis or any other thing you want to name must go through a District physi-

cian in order to establish their exceptions to a rule about hernia patients or tonsillectomies or whatever. They do that with pregnant women, but with no other health-identifiable group other than pregnancy.

Finally, they say there's an issue of fact as to whether plaintiff has suffered damages. The confusion, I suppose, in that respect arises from the fact that plaintiff did allege that there were damages to be proved in accordance with proof in the complaint. Perhaps that's what they were referring to. Title 7 essentially spells out the sick pay accrual question here as a form of equitable relief, so that **[46]** there, I think, it might just be a misunderstanding between us. Sick pay accruals are not technically a form of damages under Title 7, they are a form of equitable relief, so in that regard there's no issue of fact either.

No issues of fact remain, the issues of law have been clarified by a long series of motions in this case, and I think that on that ground I would be ready to submit the question.

MR. MARCHESI: Your Honor, I think any response that I would make to the comments made by Ms. Dunlap are adequately set forth in the points and authorities already submitted, with one possible exception. In the latest papers filed by the plaintiff, reference is made to the rational basis test versus the strict scrutiny test to be applied in this case, and I would refer the Court, or invite the Court's attention, to the decisions in the Reed case, the Frontiero (phonetic) case by the Supreme Court and the Aiello (phonetic) case recently out in the District Court.

THE COURT: Yes, I am familiar with it.

MR. MARCHESI: Very well. Then I would have no further comment and would submit the case.

THE COURT: Well, I'll file a memorandum opinion. But since I propose to file a memorandum opinion, I might as well tell you now at least what the order will be. The plaintiff's motion for summary judgment is granted. Well, this **[47]** is basically Part 7. The defendant's motion for summary judgment is denied. Plaintiff's motion for a class action certification is granted in part and denied in part. Plaintiff is designated as representative of all female permanent certificated employees of the defendant District who will be discriminated against on account of sex by the District's policy regarding maternity leave and accrued sick pay benefits to pregnant employees, and she may prosecute this action on behalf of that class.

The defendant, their agents and successors, are permanently enjoined from denying plaintiff such accumulated sick leave compensation as she is entitled to receive for the period for which she is physically incapacitated and immediately unable to work because of the effects of her pregnancy and delivery. Defendants, their agents and successors, are permanently enjoined from adopting or enforcing policies or practices, formal or informal, involving such matters as commencement and duration of leave, reinstatement and payment under any health or temporary disability insurance or sick leave plan, which apply to disability due to pregnancy or child birth, or different terms and conditions than they apply to other temporary disabilities.

Plaintiff's attorney shall submit an itemized request for reasonable attorneys' fees, and plaintiff shall submit a judgment in accordance with the order that I have just **[47-A]** entered and in accordance with the requirements of Local Rule 123.

Now, it may be quite a few days before this formal opinion comes out, because I have a big backlog. All right.

MR. MARCHESI: Thank you, Your Honor.

MS. DUNLAP: Very well, Your Honor.

ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT
(Petition for writ of certiorari, Appendix C, pg. 39)

JUDGMENT
(Petition for Writ of Certiorari, Appendix C, pg. 46)

OPINION, 9th CIRCUIT COURT OF APPEALS
(Petition for Writ of Certiorari, Appendix A, pg. 1)

Supreme Court, U. S.
FILED
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 75-1069

RICHMOND UNIFIED SCHOOL DISTRICT, RICHMOND BOARD OF EDUCATION, and W. W. SNODGRASS,
Petitioners,

vs.

SONJA LYNN BERG, individually and on behalf of all other similarly situated female employees of the Richmond Unified School District,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Does an employer's prohibition against use of accrued sick pay, by every employee who suffers a period of inability to work due to "normal" pregnancy, violate Title VII of the Civil Rights Act of 1964?

2. Is the issuance of a notice of right of action under Title VII an absolute jurisdictional prerequisite to the commencement of that Title VII action?

COUNTERSTATEMENT OF THE CASE

On November 15, 1972, plaintiff-appellee Sonja Lynn Berg was a pregnant schoolteacher, employed by defendant-appellant Richmond Unified School District (hereinafter, the "School District"). (CR 255.) The School District then had and enforced a policy that required every permanent certificated pregnant employee to commence "maternity leave", without availability of accrued sick leave pay, no later than the first day of the seventh month of her pregnancy. (CR 10, 180 at ¶VIII.) On November 15, 1972, Mrs. Berg filed a written charge with the Equal Employment Opportunity Commission (hereinafter, the "EEOC"), concerning the application of the aforesaid policies to her as a pregnant employee. (CR 255.)

On December 15, 1972, defendant-appellee Richmond Board of Education (hereinafter, the "Board") adopted a so-called "interim" maternity leave policy, instructing its Assistant Superintendent to consider individual requests for "exceptions" from the seventh-month line, and empowering him to reject such requests regardless of the requesting employee's own doctor's advice. (CR 11-14.) On or about December 20, 1972, Mrs. Berg presented a request for an "exception" from the seventh-month line, accompanied by her physician's written statement, which provided:

> "Mrs. Berg's estimated date of confinement is March 24, 1973. Mrs. Berg may work until the date of her confinement—March 24, 1973, and not stop at the seventh month date which will be January 13, 1973. If there is any additional information you need, please contact this office." (CR 16.)

In reply to Mrs. Berg's request, the Assistant Superintendent notified Mrs. Berg in writing that (1) she would be required to undergo a physical examination by a District physician, in order for there to be any chance that her leave would commence at the date that her own physician had advised (CR 18); and (2) the District reserved the "right" to reject its own physician's advice, if that physician recommended ". . . the extension of leave". (CR 18.) Counsel for Mrs. Berg sent a letter to the Assistant Superintendent on or about January 9, 1973, explaining that she believed the defendants' treatment of Mrs. Berg and other pregnant teachers violated relevant law, and urging that a non-discriminatory policy be adopted and applied. (CR 19-22.) No response to said letter was ever made. (Brief for Appellants To the Court of Appeals, for the Ninth Circuit, p. 9.)

On January 12, 1973, counsel for Mrs. Berg sent a written request to the EEOC, asking that it promptly issue to Mrs. Berg a notice of her right of action pursuant to 42 U.S. Code §2000e-5. (CR 124.) On February 5, 1973, an action pursuant to 42 U.S. Code §§1981, 1983 and 2000e et seq., and pursuant to the Fourteenth Amendment to the United States Constitution, was commenced on behalf of Mrs. Berg and a purported class in the United States District Court for the Northern District of California. (CR 1.)

On February 21, 1973, a notice of Mrs. Berg's right of action under Title VII was issued by the Department of Justice. (CR 200-201.) On February 22, 1973, after briefing and argument, District Judge Alfonso Zirpoli issued a preliminary injunction, enjoining the District, Board and Superintendent from compelling Mrs. Berg to take any leave other than a leave "when deemed necessary by [Mrs. Berg] and her physician." (CR 75.) The District Court grounded its finding of jurisdiction upon 42 U.S. Code §1983 and the Fourteenth Amendment. (CR 71-75.)

On or about March 16, 1973, so-called "revised interim provisions for *exceptions* from maternity leave policy" were issued by the Superintendent and Assistant Superintendent. (CR 44.) In their petition for certiorari, defendants-petitioners Board et al. present the above "exceptions" under the label "Richmond Unified School District Interim Maternity Leave Policy" (Petition for Certiorari, Appendix E, pp. 60-61). In fact, however, the School District's so-called "interim" policy was established on December 13, 1972, in direct reference to the mandatory seventh-month line. (CR 11-14.) The "revised interim provisions for *exceptions* to maternity leave" (CR 44) adopted in March, 1973 referred back to the December 13, 1972 policy. (CR 10-14, 44.) In summary, as the District Court properly concluded below, the March 16, 1973 "exceptions" policy contained compulsions as to commencement of "maternity" leave. (CR 303-304.)

Upon a motion to supplement the Complaint, the District Court permitted filing of the notice of right

of action. (CR 197, 199-201.) The District Court's summary judgment in favor of Mrs. Berg and the class, entered on December 5, 1973, rests exclusively upon Title VII of the Civil Rights Act of 1964, as amended in 1972, 42 U.S. Code §2000e et seq. (CR 301-306, 326-327.)

REASONS FOR DENIAL OF A WRIT OF CERTIORARI

1. THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH THIS COURT'S DECISION IN GEDULDIG v. AIELLO.

Respondent Mrs. Berg submits that the purported "conflict" between the Court of Appeals' decision in this case and this Court's decision in *Geduldig v. Aiello,* 417 U.S. 484 (1974), which petitioners School District et al. urge to this Court as grounds for issuance of a writ of certiorari, results from a logically unnecessary and legally hazardous construction of footnote 20 of this Court's opinion in *Geduldig v. Aiello.* The reading of footnote 20 of *Geduldig v. Aiello* urged by petitioners would undermine the basic prohibition, contained in Title VII of the Civil Rights Act of 1964, against sex-based discrimination in employment.

If the measure of unlawfulness of an employment practice under Title VII consisted in whether the applicant or employee affected thereby could prove it to be ". . . a mere pretext designed to effect an invidious discrimination against the members of one sex [race, color, national origin, religion][1] . . .",[2] then

---

[1] 42 U.S. Code §2000e-2 prohibits employment practices that discriminate on account of any of these classifications.

[2] *Geduldig v. Aiello,* 417 U.S. 484, 496 n. 20.

the well-established principle, that an employer's neutral or benign intent does not shelter discriminatory employment practices from challenge under Title VII, would be overturned. *See, e.g., Albermarle Paper Co. v. Moody,* 95 S.Ct. 2362, 2374 (1975); *Griggs v. Duke Power Co.,* 401 U.S. 424, 432 (1971). Furthermore, the basic burden of proof allocation under Title VII, outlined by this Court in its decision of *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), would be inverted, or worse. That is, by the importation of the standard articulated in footnote 20 of *Geduldig v. Aiello* into the Title VII context, a policy or practice that in fact discriminates on account of sex could only be successfully challenged in the event that a plaintiff could prove that the *motive* underlying its design was sex-discriminatory.

In essence, petitioners seek to have this Court delete the term "sex" from Title VII, insofar as it encompasses employment practices that are not maliciously, consciously nor designedly sex-discriminatory. Respondent contends that neither any part of *Geduldig v. Aiello,* nor any of this Court's decisions interpreting Title VII, support such a drastic dilution of Title VII's prohibitions against sex-based discrimination in employment. Therefore, the purported "conflict" between the Court of Appeals' decision in this case and this Court's decision in *Geduldig v. Aiello* is needless; it does not provide grounds for issuance of certiorari.

2. THIS CASE PRESENTS NO JURISDICTIONAL ISSUE THAT IS WORTHY OF THIS COURT'S REVIEW

Respondent Mrs. Berg concedes that her signature upon her EEOC charge was not notarized.[3] On this basis alone, petitioners School District et al. argue that the said charge was not lawfully nor timely filed, and that the District Court was thereby deprived of jurisdiction as to Mrs. Berg's Title VII claims. This position on petitioners' part is a spurious one, raising no issue that is worthy of this Court's review. Petitioners School District et al. characterize the absence of notarization of Mrs. Berg's signature upon her EEOC charge as a deprivation of their "procedural protections" under Title VII. There is simply no merit to that characterization, because petitioners were in no fashion prejudiced by this technical flaw in the charge.

Petitioners' second "jurisdictional argument" is as frivolous as their first. In the Court of Appeals, petitioners School District et al. conceded that, upon the filing of Mrs. Berg's action alleging Title VII violations, the District Court had jurisdiction pursuant to Title VII to grant "temporary relief to maintain the status quo", on and after February 5, 1973 (Opening Brief of Appellants in the Court of Appeals for the Ninth Circuit, p. 15 (No. 74-1457)), despite the fact that Mrs. Berg's notice of right of action was not supplemented into her complaint until June 7, 1973. (CR 197, 199.) Yet petitioners seek to reopen

[3]However, Mrs. Berg *did* sign the oath upon the making of said charge, petitioners' representation to the contrary notwithstanding. (CR 255.)

this matter at this level, now contending that the Court of Appeals erred in its determination that, in extraordinary circumstances, a Title VII claimant may validly seek preliminary injunctive relief to prevent violation of his or her rights *prior* to the issuance of the party's notice of right of action. Respondent Mrs. Berg submits that the Court of Appeals' rulings as to the Title VII jurisdiction of the District Court are firmly grounded in precedent and in policy, and should not be disturbed by this Court. (Petition for Certiorari, Appendix A, pp. 6-7.)

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3. CERTIORARI SHOULD BE GRANTED IN THIS CASE ONLY IF CERTIORARI IS GRANTED IN LAKE OSWEGO SCHOOL DISTRICT NO. 7 v. HUTCHISON.

Respondent Mrs. Berg concedes that, in the event that a writ of certiorari were granted upon the petition in *Lake Oswego School District No. 7 v. Hutchison,* No. 75-568, certiorari would be warranted in this case as well, to the extent that the legality under Title VII of an employer's denial of accrued sick leave pay to women employees for period of disability from employment due to "normal" pregnancy is at issue in both cases. Respondent recognizes that a writ of certiorari must be granted, if this Court determines that there was error in the Ninth Circuit Court of Appeals' holding upon that issue.

However, petitioners School District et al. do not raise a reviewable issue concerning the Court of Appeals' holding that their compulsory maternity leave policies (as distinguished from their policy denying

accrued sick pay) violate Title VII. As petitioners have admitted to this Court, California Education Code §13456, effective January 1, 1976, prohibits the School District, Board and Superintendent from further enforcement of their compulsory maternity leave policies. (Petition for Certiorari, p. 8; and Appendix C, pp. 52-53.) Section 13456 provides in pertinent part that:

> ". . . [t]he length of the leave of absence, including the date on which the leave shall commence and the date on which the employee shall resume duties, shall be determined by the employee and the employee's physician."
>
> (Appendix D, p. 52.)

As of January 1, 1976, California law squarely requires petitioners to do, and to refrain from doing, no more and no less than was ordered by the District Court below, with respect to the terms and conditions of leave of pregnant employees. (Compare, Petition for Certiorari at Appendix D, pp. 52-53; and, Judgment, CR 326-327.) Therefore, were this Court to grant certiorari and to vacate the judgment below, insofar as it prevents petitioners from having and enforcing any compulsory maternity leave policy of the sort prohibited by EEOC Guideline §1604.10, petitioners would gain no relief thereby, as to their legal duty with respect to leave policies affecting the class of female employees in this action. Petitioners must show, and they cannot show, that this Court's reversal of the judgment as to their leave policies under Title VII will prevent injury to them. *Massachusetts v. Mellon,* 262 U.S. 447 (1923). Nor can petitioners

show the requisite nexus between their status as litigants and the claim as to their leave policies which they present for review. *Flast v. Cohen,* 392 U.S. 83, 102 (1968). California law has disposed of petitioners' claim altogether and, unlike the situation that gave rise to the dissenting opinion in the case of *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70 (1955), petitioners themselves have not been foreclosed from any potential relief to them by denial of certiorari, nor has argument been had, nor has a decision been rendered by this Court. *Rice v. Sioux City Memorial Park Cemetery, supra,* 349 U.S. 70, 80. Therefore, as to petitioners' claim that the Court of Appeals erred in upholding the trier's injunction, insofar as that injunction requires petitioners not to treat leaves due to pregnancy differently than other temporary disability leaves, respondent submits that the claim presented is non-justiciable; therefore, a writ of certiorari would not be proper as to said claim.

CONCLUSION

For the reasons presented hereinabove, respondent respectfully submits that a writ of certiorari should not be granted to review the decision of the Court of Appeals for the Ninth Circuit.

Dated, February 17, 1976.

Respectfully submitted,

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